TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 194.

THE UNITED STATES *EX RELATIONE* WILLIS C. WEST,
PLAINTIFF IN ERROR,

vs.

ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 31, 1906.

(20,074.)

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1 In the Court of Appeals of the District of Columbia.

No. 1555.

UNITED STATES *ex Relatione* WILLIS C. WEST, Appellant,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.

Supreme Court of the District of Columbia.

No. 44853. At Law.

THE UNITED STATES on Relation of WILLIS C. WEST, Relator,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

Designation of Additional Parts of Record.

Filed April 19, 1905.

In the Supreme Court of the District of Columbia.

No. 44853.

UNITED STATES *ex Rel.* WEST
vs.
ETHAN A. HITCHCOCK.

To the clerk of the supreme court:

In preparing the transcript for the Court of Appeals in this case please include therein the following:

1. Demurrer to petition, filed August 19, 1901.
2. Order sustaining demurrer, etc., filed August 29, 1901.
3. Order vacating judgment, overruling demurrer, etc., filed May 23, 1902.

MORGAN H. BEACH,
Attorney for Defendant.

2 *Return to Rule to Show Cause.*

Filed August 19, 1901.

In the Supreme Court of the District of Columbia.

Law. No. 44853.

THE UNITED STATES *ex Rel.* WILLIS C. WEST
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.

Now comes the said defendant, Ethan A. Hitchcock, Secretary of the Interior, and for a return to the rule to show cause heretofore on the 5th day of August, 1901, issued in the above entitled cause, why a writ of mandamus should not issue as prayed therein, respectfully shows unto the court that the said petitioner hath not in and by his said petition, set forth facts sufficient to require this respondent to do and perform the acts in said petition prayed, for the following reasons:

First. Because the subject-matter set forth in said petition is purely of executive cognizance resting in the judgment and discretion of this respondent as Secretary of the Interior in the ordinary discharge of his official duties.

Second. Because the aforesaid subject-matter is one in which judgment and discretion are to be exercised.

Third. Because the said petitioner has a full, complete and adequate remedy for the enforcement of his said rights without resorting to the extraordinary proceedings in mandamus.

Fourth. Because the petition does not state facts sufficient to constitute a cause of action.

Fifth. Because the petition is bad in substance.

Wherefore, this respondent prays the aforesaid rule may be discharged and the said petition be dismissed at the cost of the petitioner.

ETHAN A. HITCHCOCK,
Secretary of the Interior.

ASHLEY M. GOULD,
Attorney for Def'd't.

3 Supreme Court of the District of Columbia.

THURSDAY, *August 29th*, 1901.

Session resumed pursuant to adjournment, Hon. Job Barnard, justice, presiding.

No. 44853. At Law.

THE UNITED STATES *ex Rel.* WILLIS C. WEST, Relator,
v.
ETHAN A. HITCHCOCK, Secretary of the Interior, Respondent.

This cause coming on to be heard on the petition herein filed, the rule to show cause, and the return to said rule by the Secretary of the Interior, and the same having been argued by counsel, and the court being fully advised doth this 29th day of August, 1901; adjudged and ordered that the aforesaid rule to show cause be, and the same is hereby discharged, and that the petition be dismissed, at the costs of the relator.

From the above, the relator in open court notes an appeal to the Court of Appeals of the District of Columbia, and the bond for costs is fixed in the sum of two hundred ($200.) dollars.

Supreme Court of the District of Columbia.

FRIDAY, *May* 23, 1902.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

At Law. No. 44853.

THE UNITED STATES *ex Rel.* WILLIS C. WEST, Relator,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior, Respondent.

Now comes here Mr. Robeson and presents the mandate of the Court of Appeals, and it appearing from said mandate that the judgment appealed from having been reversed, with costs, it is considered that the demurrer to the petition herein filed be, and hereby is, overruled, with leave to the respondent to plead to the petition within twenty days, as he may be advised, and further it is considered that the relator recover against the respondent thirty-three dollars and thirty cents ($33.30) for his costs of appeal as adjudged, and have execution thereof.

4 *Petition for Mandamus.*

Filed August 5, 1901.

The Supreme Court of the District of Columbia.

At Law. No. 44853.

THE UNITED STATES on Relation of WILLIS C. WEST
vs.
ETHAN A. HITCHCOCK, the Secretary of the Interior.

To the supreme court of the District of Columbia:

The petition of Willis C. West showeth:—

1. That he is a white citizen of the United States, over the age of twenty-one years, and resident on the Wichita reservation in the Territory of Oklahoma;

2. That long before the year 1891 he was married to a woman who was by blood a member of the tribe of Wichita Indians, then located on lands belonging to themselves and their affiliated bands in the Indian Territory, but now situate in the Territory of Oklahoma; that by reason of the petitioner's marriage to the said Indian woman he was, in accordance with the custom, usage and laws of said tribe of Wichita Indians, by that act adopted into, and thereby became a member of said tribe, and has been since the date of his said marriage, in all particulars and respects, treated and recognized as a member thereof by both the said tribe of Indians, and the authorities of the United States having the jurisdiction and control of Indian affairs;

3. That heretofore, to wit, on the fourth day of June, 1891, an agreement was made and entered into by and between the said Wichita tribe of Indians and its affiliated bands upon the one part, and the United States upon the other part, by which agreement it was provided that there should be selected by and allotted to each member of the said Wichita tribe of Indians and its affiliated bands, native and adopted, a tract of one hundred and sixty acres of land, said allotments not to exceed one thousand and sixty in number.

More particular reference will be hereafter made to the said agreement as effectuated by an act of Congress of March 2, 1895;

4. That at the time of the negotiation of the said agreement between the said Indians and the United States, and in confirmation of petitioner's previous adoption into the said tribe of Wichita Indians, and in the presence of the commissioners of the United States, who negotiated the said agreement, and in the presence of an assembled council of the said Wichita tribe of Indians and its affiliated bands, petitioner was formally and solemnly adopted and
5 recognized as a member of the said Wichita tribe; and that he then assisted in the negotiation of the said agreement as a member of the said tribe of Wichita Indians, and after this formal adoption and recognition, signed the said agreement for and on be-

half of, and as a member of the said tribe of Wichita Indians, as will appear from Executive Document Fourteen, Fifteen-second Congress, first session, his signature thereto being number one hundred and one; and in further recognition of petitioner's membership in said tribe, and of his rights, privileges and immunities as a member thereof, he was paid a per capita share of the tribal funds at the same time and in the same manner as all other members of said tribe were paid, in March, 1894, (which is the first roll of per capita payments ever made to said Indians to be found on file in the Indian Bureau) his name appearing on the roll as number three hundred and sixty-six, and again in 1895, his name appearing on the roll as number three hundred and ninety-one, and his name also appearing on the census roll of 1895, which census roll was prepared by the agent for the said tribe under the orders and directions of the defendant, The Secretary of the Interior, petitioner's name appearing thereon as number three hundred and sixty-nine.

Since the date of petitioner's said original adoption and entrance into the tribe down to the present day, petitioner has been continuously recognized by the Indians of the said Wichita tribe and its affiliated bands, as a *bona fide* member of said tribe, entitled to all the privileges, rights and immunities of any of the members thereof; and on May 21, 1901, at a regular and formal council of the Indians held on their reservation in the presence of their United States Indian agent, he was formally, by vote of said council, again confirmed and recognized as an adopted member of said tribe, both by general council of the individual members of the tribe and by the separate council of the chiefs thereof, having in view the preservation of the petitioner's rights as hereinafter alleged;

5. That petitioner by reason of his said adoption and the continuous and continuing recognition thereof, acquired all the rights, privileges, and immunities of whatever character or description that belong or pertain to the native members of the tribe, and was, and is an adopted member of the tribe in the legal and fullest signification of the term;

6. The defendant, Ethan A. Hitchcock, is the Secretary of the Interior of the United States.

7. That the said agreement between the Wichita tribe of Indians and its affiliated bands on the one part, and the United States on the other part, to which reference has been hereinbefore made, was heretofore, to wit, on the second day of March, 1895, ratified and carried into effect by an act of Congress entitled "An act making appropriations for current and contingent expenses of the Indian Department, and fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June 30, 18[illegible]5, and for other purposes,"
6 the same being chapter one hundred and eighty-eight of the laws of the Fifty-third Congress, third session.

8. By the agreement ratified by the said act of Congress the said Wichita and affiliated bands of Indians conveyed to the United States their lands situate in the Indian Territory, in consideration of which cession the United States agreed, and it is so provided in said act, that there should be "allotted to each and every member of the said

Wichita and affiliated bands of Indians in the Indian Territory, native and adopted, one hundred and sixty acres of land."

The said agreement and the said act required the allottees to take at least one-half the area of their allotments in grazing lands; and gave the right of personal selection to every member of the said Wichitas and affiliated bands over the age of eighteen years; limited the selection of lands to those which were not set apart for military, agency, school, schoolfarms, religious, townsite, or other public uses, or were in section- sixteen, thirty-six, thirteen, and thirty-three of every township, which were reserved for school purposes; vested in the Secretary of the Interior the power and duty of approving the allotments made; and provided for the sale of the lands remaining after the making of allotments under the act, and the payment of the sum realized therefrom to the said Indian bands under certain conditions, especially providing that the sum thus to be paid should be "subject to a reduction for each allotment of land that may be taken in excess of one thousand and sixty," which said number represented the number of the members of the said Wichita tribe of Indians and its affiliated bands, native and adopted, entitled to such allotments, as previously ascertained by said commissioners negotiating the said agreement, which is by the said act of Congress carried into effect." (28 Stat. L. 876, 895, 896 and 897.)

9. The inclusion of petitioner as a member of said tribe, and of all the native and adopted members of said tribe of Wichita Indians and its affiliated bands, did not cause the allotments to exceed the number of one thousand and sixty, and by reason of numerous deaths of members of said tribe and its affiliated bands, since the execution of the said agreement and the enactment of the said law, the allotments to be made to those entitled at this time, including members native and adopted, will not exceed, but will fall below one thousand and sixty in number.

9½. In accordance with the provisions of the said agreement and of the said act of Congress of March 2, 1895, ratifying the same, and in compliance with the rules and regulations made by the Secretary of the Interior, petitioner has heretofore selected a certain tract of one hundred and sixty acres of the said lands of the Wichita tribe and its affiliated bands of Indians, not included within lands reserved for military, agency, school, school-farms, religious, townsite, or other public uses, or in sections sixteen, thirty-three, thirteen or thirty-six, and being a tract upon which he has made valuable and permanent improvements, and which is now used and oc-
7 cupied by petitioner, and which complies in all other particulars with the provisions, restrictions and requirements of the said agreements and the said ratifying act.

10. It is further provided by the said act of March 2, 1895, "that wherever in said tract of country any one of said Indians has made improvements and now uses and occupies the land embracing such improvements, such Indian shall have the undisputed right to make his or her selection to conform to legal sub-divisions, however, so as to include such improvements without reference to the classification of land hereinbefore recited."

11. In accordance with the further provisions of the said agreement and the said ratifying act, and in compliance with the rules and regulations made and provided by the Secretary of the Interior, petitioner has regularly, duly and formally applied for the allotment to him of the said one hundred and sixty acres of land so selected and located by him, which are described as follows:

The south east quarter (¼) of section number fourteen (14) of township number ten (10) north of range number eight (8) west.

12. That under and by virtue of the said act of Congress of March 2, 1895, and of previous statutes, and of his official position as Secretary of the Interior, there was devolved upon the said Ethan A. Hitchcock, Secretary of the Interior, the plain ministerial unqualified; absolute and peremptory duty of approving the selection and directing the allotment to the petitioner of the lands hereinbefore described.

13. That notwithstanding petitioner's rights by reason of his said adoption into the tribe, and notwithstanding his selection and taking of the said lands, and his regular and formal application for the allotment thereof, the said Ethan A. Hitchcock, Secretary of the Interior, has wrongfully and in violation of law, and in disregard of the said rights of petitioner, neglected, failed and refused to allot to your petitioner the lands included within his said selection, or any other lands, and that the said Ethan A. Hitchcock, Secretary of the Interior, himself and by those subordinate in authority to him, still neglects, fails and refuses to recognize the rights of petitioner, which are still existent, and to allot to him the lands included within his selection, or any other lands out of the reservation of the said Wichita tribe of Indians and its affiliated bands.

14. By the said act of Congress of March 2, 1895, it was further provided that whenever any of the said lands of the Wichita Indians, acquired by the agreement which is thereby ratified, should be by operation of law or by proclamation of the President, opened to settlement, they should be disposed of under the general provisions of the homestead and town-site laws of the United States; and that said lands should be opened to settlement within one year after the making of the allotments therein provided for.

By the act of Congress of March 3, 1901, being chapter 46 of the Laws of the 56th Congress, second session, entitled "An act to
8 supplement existing laws relating to the disposal of lands and so forth," it was provided that said lands acquired from the Wichita and affiliated bands of Indians should be opened to settlement by proclamation of the President. In accordance with the terms of the said act the President of the United States by his formal proclamation declared the said lands open to settlement on August sixth, 1901.

In accordance with the original act modifying the said agreement between the United States and the said Indians, the Secretary of the Interior has caused allotments to be made to the various members of the Wichita and affiliated bands, except the petitioner and certain other members of the said bands, and said schedules of allotment, omitting the petitioner, have been finally approved and the work of

allotment finally closed, and said petitioner finally excluded from the benefit of the provisions of the said act by the said wrongful and unlawful failure, neglect and refusal of the said Secretary of the Interior to approve petitioner's selection and taking, and to allot to him the lands in question.

15. Under the said proclamation of the President of the United States the said lands of the Wichita and affiliated bands of Indians will be, on August sixth, 1901, at nine o'clock, a. m., opened to settlement under the homestead laws of the United States and the rules prescribed by the said Secretary of the Interior; and in view of the valuable improvements erected by the petitioner upon the said lands taken and selected by him, as hereinbefore shown, and the value of its location, parties entitled to make entry under such homestead laws and the rules of the Secretary of the Interior, will immediately make homestead entry upon the said lands selected and taken by petitioner, and will thereby deprive petitioner of and preclude him from the enjoyment, occupation, use and possession of the said lands to which he is under the law entitled, and will thereby occasion to him great and irreparable injury.

16. That the petitioner has no other adequate and specific remedy at law for the infringement upon or the destruction of the rights herein alleged, save the extraordinary process of this honorable court, without the aid of which the petitioner will be forever deprived of his rights hereinbefore shown, which are now existent, and which it is the present duty of the Secretary of the Interior to preserve and effectuate by the approval of the said selection and taking and by the allotment to the petitioner of the lands so selected and taken by him.

Petitioner therefore prays that a writ of mandamus issue out of this honorable court, directed to the said Ethan A. Hitchcock, Secretary of the Interior, commanding him to approve the selection and taking of the said lands, hereinbefore described to your petitioner, and to allot the same to petitioner; or that an alternative writ of mandamus, or an order to show cause why a peremptory writ should not be granted, issue, directed to the said Ethan A. Hitchcock, Secretary of the Interior, and returnable at such time as shall command itself to the discretion of this honorable court, and that in
9 the mean time the said Secretary of the Interior be directed to withdraw the said lands from entry and settlement pending the final action of the court herein.

And your petitioner prays that he may have such other and further relief as to this honorable court will appear right and proper, and to that end that all necessary orders and decrees be entered.

Your petitioner further represents that this application is not made for the purpose of delay, but solely for the purpose of protecting the vested rights of your petitioner against the wrongful and unlawful act or omission of the defendant The Secretary of the Interior.

WM. H. ROBESON,
W. C. SHELLEY,
W. S. FIELDS,
Att'ys for Pet'r.

DISTRICT OF COLUMBIA, *ss:*

I, Walter S. Fields, do solemnly swear that I am the agent and attorney in fact of the petitioner in the foregoing petition; that the petitioner is a non resident of the District of Columbia, and is absent from this jurisdiction; that I have read the foregoing petition by me subscribed as the agent and attorney of the petitioner Willis C. West and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that those stated upon information and belief, I believe to be true.

WALTER S. FIELDS.

Sworn to and subscribed before me this August 5, 1901.

GEO. F. GRAHAM,
Notary Public.

[SEAL.]

Rule to Show Cause.

Filed August 5, 1901.

In the Supreme Court of the District of Columbia.

At Law. No. 44853.

THE UNITED STATES *ex Rel.* WILLIS C. WEST
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.

It is this fifth day of August, 1901, ordered that Ethan A. Hitchcock, Secretary of the Interior, show cause on or before the 13th day of August, 1901, why the writ of mandamus should not issue as prayed in the petition filed in this court provided a copy of this order be served on the said The Secretary of the Interior on or before the 7th day of August, 1901.

HARRY M. CLABAUGH, *Justice.*

10 *Marshal's Return.*

Served copy of within order and copy of the petition in this cause on Thomas Ryan acting Secretary of the Interior August 5, 1901.

AULICK PALMER, *Marshal.*
S.

Answer of Defendant Hitchcock.

Filed July 11, 1902.

In the Supreme Court of the District of Columbia.

At Law. No. 44853.

THE UNITED STATES on the Relation of WILLIS C. WEST
v.
ETHAN A. HITCHCOCK, Secretary of the Interior.

Comes now the above named Ethan A. Hitchcock, as Secretary of the Interior, and in answer to the petition of the relator filed herein, alleges:

That by sections 441 and 463 of the Revised Statutes this defendant, as Secretary of the Interior, has at all times during his incumbency of that office been charged with the supervision and direction of all public business relating to the Indians, the management of Indian affairs and the management of matters arising out of Indian relations; that by the agreement between the United States and the Wichita and affiliated bands of Indians in Oklahoma Territory, ratified by the act of Congress approved March 2, 1895, (28 Stat., 876, 894), all allotments in severalty to the members of such Wichita and affiliated bands of Indians of land relinquished to the United States by such agreement were expressly subjected to the approval of the Secretary of the Interior; that the lands applied for by relator as an allotment in severalty to him are a part of the lands relinquished to the United States by the agreement so ratified; that the application of the relator for such allotment in severalty was made and is now insisted upon by him under the agreement so ratified, and not otherwise; that by the terms of the agreement so ratified the allotments in severalty to be made thereunder were to be and are restricted to the members of said Wichita and affiliated bands of Indians, native and adopted; that the application of the relator for an allotment in severalty to him came before this defendant, as Secretary of the Interior, for examination, consideration and approval or disapproval, in the due and regular course of the public business relating to the Indians, the management of Indians affairs
11 and the management of matters arising out of Indian relations, and in the due and regular course of administering and executing that portion of the agreement so ratified which subjects to the approval of the Secretary of the Interior all allotments in severalty sought to be taken thereunder; that when the application of relator for an allotment to him came before this defendant as Secretary of the Interior, this defendant had no knowledge respecting the relator, or his relation to the Wichita and affiliated bands of Indians, or any member thereof, and did not know whether or not the relator was by nativity or adoption a member of said Wichita and affiliated bands of Indians, and this defendant has not at any time

since then acquired any knowledge respecting the relator or his relation to the Wichita and affiliated bands of Indians, or any member thereof, or his claimed membership thereof, excepting such knowledge thereof as was obtained in the course of the defendant's official examination and consideration of the relator's application for an allotment, with a view to the approval or disapproval thereof; that for the purpose of enabling him to properly discharge his duty in the premises and to give due respect to the rights, if any, of the relator, the Wichita and affiliated bands of Indians, or the United States, and especially for the purpose of enabling him to correctly determine whether the relator was entitled under the agreement so ratified to an allotment in severalty to be taken from the lands so relinquished to the United States, this defendant, as Secretary of the Interior, examined and considered the said application of the relator and all evidence and proofs presented by or in behalf of the relator in support of such application, including each and all of the matters set forth in the petition herein in support of such application, and also such other evidence and proofs bearing thereon as was embodied in the public records and files of the Indian Bureau, and in the Department of the Interior, and upon full consideration of the said application of the relator and of all such evidence and proofs, this defendant, as Secretary of the Interior, did, on the 3rd day of July, 1901, reach and announce a conclusion and decision that the relator was not, by nativity or adoption, a member of the Wichita and affiliated bands of Indians, and for that reason was not entitled to an allotment under the agreement so ratified, and thereupon this defendant, as Secretary of the Interior, denied the application of the relator for said allotment.

Having fully answered the petition of the relator filed herein, this defendant prays that the rule to show cause heretofore issued in this case be discharged, and the petition aforesaid be dismissed with costs to the defendant.

E. A. HITCHCOCK,
Secretary of the Interior.

ASHLEY M. GOULD,
WILLIS VAN DEVANTER,
Attorneys for Defendant.

12 UNITED STATES OF AMERICA, *District of Columbia, ss:*

Ethan A. Hitchcock, being first duly sworn, upon his oath deposes and says that he is the Secretary of the Interior, and as such Secretary is the defendant named in the foregoing answer; that he has read said answer and the several matters of fact set forth therein are true as he verily believes.

E. A. HITCHCOCK.

Subscribed in my presence and sworn to before me this ninth day of July, 1902.

WM. H. DE LACY,
Notary Public.

[NOTARIAL SEAL.]

Motion for Peremptory Mandamus.

Filed September 30, 1902.

In the Supreme Court of the District of Columbia.

No. 44853.

THE UNITED STATES on the Relation of WILLIS C. WEST
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.

Comes the relator, Willis C. West, by attorney, and moves the court for the issuance of a peremptory writ of mandamus, as prayed in the petition.

WILLIS C. WEST,
By W. H. ROBESON, *Att'y.*

WM. H. ROBESON,
WM. C. SHERLEY,
WALTER S. FIELD,
Attorneys for Relator.
CLAYTON E. EMIG,
Of Counsel.

In support of this motion it will be argued—

First. That the allegations of the return, that the defendant, as the Secretary of the Interior, did "reach and announce a conclusion and decision that the relator, Willis C. West, was not by nativity or adoption a member of the Wichita and affiliated bands of Indians," is immaterial and insufficient.

Second. That the relator was adjudged to be an adopted member of the Wichita and affiliated bands of Indians by a court of competent jurisdiction; and that he was such at the time of the making of his said selection, and at the time of the making of his application to defendant, as the Secretary of the Interior, for his approval of said selection.

13 Third. That the return to the petition is insufficient in that it does not state the facts upon which the defendant, as the Secretary of the Interior, refused the approval of the relator's selection.

Supreme Court of the District of Columbia.

WEDNESDAY, *February* 10, 1904.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

At Law. No. 44853.

THE UNITED STATES *ex Rel.* WILLIS C. WEST, Relator,
v.
ETHAN A. HITCHCOCK, Secretary of the Interior, Resp't.

Upon hearing the motion of the relator for a peremptory writ of mandamus, it is considered that said motion be, and hereby is, overruled, with leave to said relator to plead within ten days.

Demurrer to Answer.

Filed February 10, 1904.

In the Supreme Court of the District of Columbia.

At Law. No. 44853.

THE UNITED STATES on the Relation of WILLIS C. WEST
v.
ETHAN A. HITCHCOCK, Secretary of the Interior.

The petitioner says that the answer of the defendant heretofore filed in this cause is bad in substance.

WM. H. ROBESON.
W. C. SHELLEY.
W. S. FIELD.

Marginal Note.

Matters of law intended to be argued are that—

I. The defendant in his answer does not state any facts which show that the subject matter of his decision of July 3, 1901, denying an allotment to petitioner, was one of exclusive executive cognizance or vested solely in his judgment and discretion.

II. The defendant in his answer does not deny any of the
14 allegations of the petition and does not state that in hearing and determining the application of petitioner for allotment of land he had before him any fact or considered any question bearing upon or relating to said application other than those contained in the allegations of the petition.

III. The defendant in his answer does not state facts which constitute a sufficient answer to the rule to show cause heretofore issued in this case.

Supreme Court of the District of Columbia.

FRIDAY, *March* 18, 1904.

Session resumed pusuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

At Law. No. 44853.

THE UNITED STATES *ex Rel.* WILLIS C. WEST, Petitioner,
v.
ETHAN A. HITCHCOCK, Secretary of the Interior, Respondent.

Upon hearing the demurrer to the answer of the respondent, it is considered that said demurrer be, and hereby is, overruled, with leave to the relator to plead within ten days.

Relator's Pleas.

Filed March 24, 1904.

In the Supreme Court of the District of Columbia.

At Law. No. 44853.

THE UNITED STATES *ex Rel.* WILLIS C. WEST
vs.
ETHAN A. HITCHCOCK, the Secretary of the Interior.

1. The relator says that the defendant, as Secretary of the Interior, did not, by the decision alleged in the answer to have been made by him on July 3, 1901, decide that the relator was not by nativity or adoption a member of the Wichita or affiliated band of Indians, and for that reason deny him the said allotment.

2. The relator further says that the defendant, when he made the decision alleged in the answer to have been made by him on July 3, 1901, did not have before him or consider any evidence tending to show that the relator was not entitled to said allotment.

3. The relator further says that the defendant, when he made the decision alleged in the answer to have been made by him on
15 July 3, 1901, did not have before him or consider any evidence tending to establish any facts other than those set out in the relator's petition.

4. The relator further says that the defendant, when he made the decision alleged in the answer to have been made by him on July 3, 1901, did not have before him or consider any evidence tending to establish any facts which permitted him to exercise the discretion vested in him by law as Secretary of the Interior.

WM. C. SHELLEY,
WM. H. ROBESON,
SAMUEL A. PUTNAM,
W. S. FIELDS,
Attorneys for Relator.

Demurrer to Petitioner's Pleas.

Filed April 19, 1904.

In the Supreme Court of the District of Columbia.

At Law. No. 44853.

THE UNITED STATES *ex Rel.* WILLIS C. WEST
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.

The defendant says that the petitioner's pleas, and each and every one thereof are bad in substance.

MORGAN H. BEACH,
Attorney for Defendant.

NOTE.—Among the matters of law intended to be argued in support of the foregoing demurrer are the following:

1. That the answer of the defendant is conclusive as to matters of fact in a mandamus proceeding.
2. That the matters alleged in each of said pleas are immaterial.

Supreme Court of the District of Columbia.

FRIDAY, *May* 27, 1904.

Session resumed pursuant to adjournment Mr. Justice Barnard, presiding.

* * * * * * *

At Law. No. 44853.

THE UNITED STATES *ex Rel.* WILLIS C. WEST, Petitioner,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior, Resp't.

Upon hearing the demurrer of the respondent to the four pleas of petitioner to respondent's answer, it is considered that the
16 demurrer to the first plea be, and hereby is, overruled, and that said demurrer to the second, third, and fourth pleas be, and hereby is, sustained.

Joinder in Issue to Petitioner's First Plea.

Filed June 24, 1904.

In the Supreme Court of the District of Columbia.

At Law. No. 44853.

THE UNITED STATES *ex Rel.* WILLIS C. WEST
v.
ETHAN A. HITCHCOCK, Secretary of the Interior.

The defendant joins issue on the petitioner's first plea.

MORGAN H. BEACH,
Attorney for Defendant.

Supreme Court of the District of Columbia.

WEDNESDAY, *April* 12, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

At Law. No. 44853.

THE UNITED STATES *ex Relatione* WILLIS C. WEST, Relator,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior, Defendant.

Now come the relator by his attorneys Messrs. Robeson, Shelley, Field and Putnam, and the defendant by his attorneys, Messrs. Beach and Adkins and Barclay, and neither party having required in writing a trial by jury, this cause is tried by the court; whereupon, after hearing the evidence and arguments of counsel the court finds and determines as follows: 1. On all the evidence the court finds for the defendant, on the grounds that the evidence is insufficient in law to support a finding for the relator. 2. The court finds that the defendant did reach and announce a conclusion and decision that the relator was not, by nativity or adoption, a member of the Wichita and affiliated bands of Indians, and for that reason was not entitled to an allotment of land as prayed, and that thereupon the defendant did deny the application of the relator for such allotment. 3. The court finds that the defendant, as Secretary of the Interior, disapproved the application of the relator for membership by adop-
17 tion in the Wichita tribe or band of Indians. Thereupon counsel consent that judgment may be forthwith rendered: Therefore it is considered that the prayer of the relator for the writ of mandamus be and hereby is denied, the rule to show cause discharged, and the petition dismissed at the costs of the relator, and that the defendant have execution thereof.

The relator notes an appeal to the Court of Appeals, bond for costs thereon being fixed in the penalty of one hundred dollars.

Opinion of the Court.

Filed April 12, 1905.

In the Supreme Court of the District of Columbia.

No. 44853. Law.

THE UNITED STATES *ex Rel.* WILLIS C. WEST
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.

The relator filed his petition in this court August 5, 1901, praying for a peremptory writ of mandamus against the defendant, to command him to approve the selection of 160 acres of land, with the improvements thereon, claimed by the petitioner as an allotment under the act of Congress of March 2nd, 1895, (28 Statutes at Large, page 876.)

The relator in his petition avers, to state it briefly, that he is entitled to all the rights of an Indian, belonging to the Wichita and affiliated bands of Indians, residing on the Wichita reservation in the Territory of Oklahoma; that he is a white man, but was regularly adopted as a member of said bands, he having married an Indian woman of the Wichita tribe, long before 1891.

On June 4th, 1891, the said tribe, and the United States, entered into an agreement by which the lands were to be ceded to the United States, and each member of said tribe, native and adopted, was to have allot-ed to him 160 acres of land; that he selected the land on which he had made improvements, but the defendant refused to approve of the same, and denied his right to an allotment.

The first pleading by the respondent was in the form of a demurrer to the petition; and on the case being heard in this court on the said demurrer, the mandamus was refused; and thereupon the case was appealed to the Court of Appeals, and the judgment of this court was reversed; and the proper method of pleading, by answer, instead of demurrer, was pointed out by the court in its opinion, which is reported in 19th Appeals, D. C. 333.

On the case being remanded to this court the defendant filed an answer to the petition in which he states, that he is charged with the general supervision and direction of all public business relating to the Indians and their affairs, under sections 441 and 463
18 of the Revised Statutes of the United States; and that by the said agreement between the United States and the Wichita and affiliated bands of Indians in Oklahoma Territory, ratified by the act of March 2nd, 1895, all allotments in severalty, to the members of said bands, were expressly subjected to the approval of the Secretary of the Interior; and that all such allotments were to be restricted to the members of said bands, native and adopted; that the

application of the relator for an allotment, came before the defendant, as Secretary of the Interior, for approval; and at that time the defendant had no knowledge respecting the relator, either as to his nativity or adoption, as a member of said bands, and has obtained no knowledge since on said subject excepting such as was obtained in the course of the defendant's official examination and consideration of the relator's application for an allotment, with the view to its approval or disapproval; and in order to properly discharge his duty in the premises, this defendant, as Secretary of the Interior, examined and considered the said application, and all evidence and proofs presented by, or in behalf of, the relator; and also such other evidence and proofs bearing thereon, as were embodied in the public records and files in the Indian Bureau, and in the Department of the Interior; and upon consideration of all such evidence and proof, the defendant did, as such Secretary, on July 3rd, 1901, reach and announce a conclusion and decision, that the relator was not, by nativity or adoption, a member of the Wichita and affiliated bands of Indians, and for that reason was not entitled to an allotment in the premises, and he therefore denied his application for the same.

To this answer the relator first filed a demurrer, which was overruled by the court; and thereupon he filed four pleas to said answer.

The defendant demurred to the said pleas, and the demurrer was overruled as to the first plea and sustained as to the others.

The first plea is as follows:

1. "The relator says that the defendant, as Secretary of the Interior, did not, by the decision alleged in the answer to have been made by him on July 3rd, 1901, decide that the relator was not, by nativity or adoption, a member of the Wichita or affiliated band of Indians, and for that reason deny him the said allotment."

On this plea issue was joined, and the case came on for trial before the court, without a jury, and at the trial certain documentary evidence was submitted, as follows:

Letters from the Commissioner of Indian Affairs to the Secretary of the Interior dated, February 18th, 1884; December 5th, 1893; June 7th, 1895; and April 18th, 1901. Also regulations of the Interior Department in Indian affairs, dated, September 22nd, 1884; December 28th, 1893; and March 1st, 1904. Also letters from the Secretary of the Interior to the Commissioner of Indian Affairs, dated September 22nd, 1884; December 13th, 1884; February 7th, 1898; September 8th, 1900; and July 3rd, 1901. Also let-
19 ters from the Commissioner of Indian Affairs as follows: Letter of February 27th, 1886, to Charles Hill, Indian agent; April 3rd, 1894, to Mrs. Jane Shirley; September 10th, 1901, to Davidson and Riddle.

To the admission of these documents as evidence in the case, the relator by his counsel objected; and mainly for the reason that the answer of the defendant did not put in issue the fact that the said relator was an adopted Indian in the said band; and therefore he contended, it was conclusively shown that in this case, the relator must be considered to be one of those entitled to an allotment under the said act of Congress, because the petition averred it, and the answer did not deny it.

This court held, in disposing of the demurrer to the answer, that the averments of the answer that the respondent on July 3rd, 1901, reached and announced a conclusion and decision, that the relator was not, by nativity or adoption, a member of the said band, and for that reason denied his application for such allotment, did in effect, deny that the relator was a member of said band; and that, according to the answer, the relator's failure to produce proof of such membership to the Secretary of the Interior, was the sole cause for the denial of his claim.

The plea to the answer now raises the issue as to that alleged decision of the Secretary, and as to the reason on which the decision was based; and it seems to me that on this issue the documentary evidence offered was competent, and must be considered by the court.

Contained in one of these papers is the statement made in an affidavit filed by the relator with the representative of the Government, dated February 27th, 1901, and in which it is stated he was married on February 16th, 1891, to Cora Caruth, a member of the Wichita tribe of Indians. This is in the letter from the Commissioner to the Secretary, of April 18th, 1901.

This letter also states that the said relator went among the Indians of the Wichita reservation, in 1882; that the Indian name of the woman he married was Ke-ah-sun-ni-as, a Wichita woman; that in 1891 said relator signed the agreement with the Indians negotiated April 4th, 1891, and confirmed by act of Congress of March 2nd, 1895; that his name first appears upon the Wichita tribal rolls, (meaning the grass payment rolls,) in March, 1894, but he was not paid at that time, no authority for such enrolment appearing; that he was paid a *pro-rata-share* of the grass money in 1895-96, and his name continued on the rolls until the action of February 7th, 1898, wherein the department disapproved of some twenty-nine adoptions which were asked for, when his name was taken off by the Indian agent.

It also appears that at a meeting of the council of said tribe on April 23rd, 1897, 92 voted for his adoption, and 24 voted against it. That the only reason for his adoption given by the tribe was the fact that he had married the Indian woman in 1891. It also appears that in their council of February 21st, 1895, the said Indians rejected his application for admission to their tribe.

20 It also appears by a letter from the Commissioner to the Secretary, dated June 7th, 1895, that it had been the policy of the Indian Office to refuse to recommend the approval of the adoption by Indians of white persons, or others, unless good and sufficient reason existed therefor; that it was the desire and aim of said office to carry out the policy of the Government, in causing the breaking up of the tribal relations, the taking of land in severalty by the Indians, and their assimilation into our civilization as citizens of the United States.

The Commissioner states in said letter:

"It is the policy of this office to break up their tribal relations by making citizens of Indians, and not to increase their number by making Indians of citizens."

It also appears from the evidence in these documents, that certainly as early as 1884, the regulations promulgated by the Interior Department governing Indian affairs, did not recognize persons, not Indians, as entitled to the tribal rights of Indians, unless they had been adopted by the tribal authorities, and such adoption approved by the Indian Office; or unless such rights had been specially provided for by treaty, or special act of Congress.

It nowhere appears in any testimony offered that the Indian Office, or the Department of the Interior, has ever approved of the adoption of the relator, although the vote of the council of Indians of April 23rd, 1897, and again a vote of May 21st, 1901, *was* in favor of the adoption of said relator into said tribe. Notwithstanding these two votes and recommendations on the behalf of the Indians themselves, or a majority of them, the Secretary of the Interior, decided and announced in said letter of July 3rd, 1901, to the Commissioner of Indian Affairs, that such adoption and enrolment should be denied.

The language used by the Secretary in reference to the relator, is as follows:

"Willis C. West.—Agent Randlett reports that applicant is a highly respectable white citizen of Minco, I. T., married to a Wichita woman, and recommends approval of his adoption. The vote of the council of May 21st, last, was 34 in favor and 5 opposed; chiefs 5 in favor, 2 opposed.

This case has been fully reported to the department in your letter of April 18th, last with unfavorable recommendation, for the reason that you do not think that "residence with the Indians since 1882, and marriage into the tribe in 1891, in the absence of evidence to show any consideration or services rendered the tribe, are such (facts) as should entitle him to receive benefits with the Wichitas." The wife and children will receive allotments with the Indians, and as applicant does not live with the tribe, and seems well to do, he should take his chances with other outsiders when the lands are opened to homestead entry, and the application of Willis C. West for enrolment by adoption with the Wichita tribe is denied."

The contention of the relator is that the Secretary arbi-
21 trarily refused to approve of the allotment to which he, the relator, was entitled; and that he did not in good faith have before him any question as to the regular or legal adoption of the relator into said tribe.

As to the refusal to approve the allotment selected by the relator, the petition itself is confirmed by the answer so that there is no dispute whatever as to the fact that the Secretary did so refuse.

It seems to me that the evidence shown by these documents, and particularly the above recited action of the Secretary, in the letter of July 3rd, 1901, states clearly the reason for such denial on the part of the Secretary of the relator's claim for the allotment, namely, that the said relator was not a member of said tribe by adoption, although the Indians had, on two occasions, by a majority vote, recommended his adoption. The evidence also shows to my mind that it was not within the power of a band of Indians, under Government guardianship, to enlarge their band by adopting into it

white men, without the approval of such adoption by the Government.

I must therefore find the issue joined on this plea, against the relator, and in favor of the defendant. Whether the decision of the Secretary in refusing to approve the adoption is right or wrong, it is not material for this court to consider.

The Supreme Court of the United States seems to have made this point very plain in the case of The United States, *ex rel.* Riverside Oil Company, *vs.* Hitchcock, Secretary, &c., (190 U. S. 324). The court there says with reference to the duty of the Secretary in that case:

"Having jurisdiction to decide at all, he had necessarily jurisdiction: and it was his duty to decide as he thought the law was, and the courts had no power whatever under those circumstances to review his determination by mandamus or injunction."

Now, in the present case, if he had the right to decide on the testimony submitted, including the affidavit of the relator, the fact that the said relator *was* or *was not* a member of said tribe by adoption, although he may decide it wrongly, this court can not review his decision.

This decision was made in the performance of an executive duty with which he is charged by the general law: and the courts are without power to correct errors of judgment in the performance of such duties. This conclusion must necessarily require the court to deny the relator's motion for a peremptory writ of mandamus, and to dismiss his petition.

At the request of counsel for the defendant, the court makes the following findings of fact:

(1.) On all the evidence the court finds for the defendant, on the grounds that the evidence is insufficient in law to support a finding for the relator.

(2.) The court finds that the defendant did reach and announce a conclusion and decision that the relator was not, by nativity or
22 adoption, a member of the Wichita and affiliated bands of Indians, and for that reason was not entitled to an allotment of land as prayed, and that thereupon the defendant did deny the application of the relator for such allotment.

(3.) The court finds that the defendant, as Secretary of the Interior, disapproved the application of the relator for membership by adoption in the Wichita tribe or band of Indians.

And at the request of the counsel for the defendant, the court finds as matter of law:

(1.) That before any person can be entitled to an allotment of land under the act of Congress approved March 2nd, 1895, ratifying the agreement of June 4th, 1891, as an adopted member of the Wichita or any affiliated band of Indians, such person must show that his adoption as such member has been approved by the Secretary of the Interior.

(2.) The court further finds as matter of law, that it was the duty of the Secretary of the Interior in passing upon the application of the relator for an allotment of land, to determine whether or not

said relator was within the category of persons entitled to such allotment, and that the decision of the defendant in that regard can not be reviewed by this court in this proceeding.

JOB BARNARD, *Justice.*

Memorandum.

April 12, 1905.—Appeal bond filed.

Supreme Court of the District of Columbia.

WEDNESDAY, *April* 12, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * * * *

At Law. No. 44853.

UNITED STATES *ex Rel.* WILLIS C. WEST
vs.
ETHAN A. HITCHCOCK, Sec'y of Interior.

Now comes here the relator and tenders to the court here his bill of exceptions taken during the trial hereof, and prays that the same be duly signed, sealed, and made part of the record, which is accordingly done.

23 *Bill of Exceptions.*

Filed April 12, 1905.

In the Supreme Court of the District of Columbia.

No. 44853. Law.

THE UNITED STATES *ex Rel.* WILLIS C. WEST
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.

Be it remembered that the above entitled cause came on for trial before Mr. Justice Barnard without a jury, neither party having required in writing a trial by jury, on April 12, 1905, Messrs. William H. Robeson, W. C. Shelley, Walter S. Field and Samuel A. Putnam appearing on behalf of the relator, and Messrs. Morgan H. Beach, United States attorney, Jesse C. Adkins, assistant United States attorney, and Fred H. Barclay, assistant attorney, Interior Department, appearing for the defendant.

And thereupon the relator, to maintain the issues on his behalf joined, gave in evidence the following duly certified copy of the decision of the Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *July* 3, 1901.

The Commissioner of Indian Affairs.

SIR: I am in receipt of your letter of the 19th ultimo, inclosing for the consideration and determination of the department, communications from Lt. Col. James F. Randlett, Indian agent of the Kiowa agency, Oklahoma, dated May 23d, 25th and 28th, and June 7th, and 10th, 1901, respectively, together with a number of letters and papers from other persons concerning the applications of the following named persons for enrolment by adoption with the Wichita and affiliated bands of Indians of the Kiowa agency:

* * * * * * *

Willis C. West.

In his letter of May 23d, last, Agent Randlett, in returning a list of names of applicants, for adoption, submitted by Towaconie Jim and White Bread, during their recent visit to this city, which was sent to him for investigation and report, states that

"It is apparent that the visit of White Bread and Towaconie Jim recently made to Washington was investigated by the white men interested in the matter under consideration, and it now appears that leading men of the tribe have been led to believe that it will be for the interest of their people to have said white men fully incorporated with them, etc., etc."

24 Again Agent Randlett in a letter of April 10th, last reported that he had

"reason to believe that their present visit to Washington was induced by influence of white men married into their tribes and desiring enrolment with them, whose present interest prompted them to furnish the money for expenses of the delegation while away from the reservation," etc., etc.

You report that Agent Randlett adds that he has carefully considered the question of holding to the wishes of these Indians in the adoption of the white men named above, and is inclined to believe that if the same were approved, the whites so admitted would select their allotments and the Indians who are interested in their admission and are now holding back, would follow their example; and that the number of the persons adopted, if added to the roll, would not increase the allotment list to the 1060 provided for in the agreement for the relinquishment of their surplus land. He also transmits the formal proceedings of a council of the chiefs and headmen of the Wichita and affiliated bands of Indians, held May 21, 1901, for the purpose of acting upon the cases of persons seeking admission to their tribes by adoption, in which their votes on each application for such membership is shown. You further state that it also appears in this council record, that after the chiefs and headmen had voted upon the names presented, the agent took a vote of the chiefs alone on said applications, which vote agrees with the action of the full council in all cases except those of Miss Adelia L. Strong and Miss Kate Dagnett. In the first case, the full vote was a tie,

and the chiefs voted 5 in favor to 2 against; and in the latter case, the full council rejected Miss Dagnett by 27 to 18, while the chiefs accepted her by a vote of 4 to 3 against.

All the 47 cases above mentioned are taken up by you in alphabetical order, and in detail, and a report is submitted on each case. Your report, and all the papers have received the careful consideration of the department, and the decisions as made in each case are as follows:

* * * * * * *

Willis C. West.—Agent Randlett reports that applicant is a highly respectable white citizen of Minco, I. T., married to a Wichita woman, and recommends approval of his adoption. The vote of the council of May 21st, last, was 34 in favor and 5 opposed; chiefs 5 in favor, 2 opposed.

This case has been fully reported to the department in your letter of April 18th, last, with unfavorable recommendation, for the reason that you do not think that "residence with the Indians since 1882 and marriage into the tribe in 1891, should, in the absence of evidence to show any consideration or services rendered the tribe, are such as should entitle him to receive benefits with the Wichitas." The wife and children will receive allotments with the Indians, and as applicant does not live with the tribe, and seems well to do, he should take his chances with other outsiders when the lands are opened to homestead entry, and the application of Willis C. West, for enrollment by adoption with the Wichita tribe is denied.

* * * * * * *

The enclosures of your letter of the 19th ultimo, and those forwarded with previous letters in relation to the above adoptions, are herewith returned.

Very respectfully, E. A. HITCHCOCK, *Secretary.*

Thereupon the relator having rested, the defendant, to maintain the issues on his behalf gave in evidence duly certified copies of the following rules and regulations and correspondence of the Interior Department.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *February* 18, 1884.

The honorable the Secretary of the Interior.

SIR: I have the honor to submit herewith for your approval, a revision of the "Instructions to Indian agents" of October 1, 1880, entitled "Regulations of the Indian Department, 1884," containing the regulations in force at the present date governing the management of affairs growing out of Indian relations.

Very respectfully, your obedient servant,

H. PRICE,
Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *September* 22, 1884.

The Commissioner of Indian Affairs.

SIR: The revision of the regulations of the Indian Department submitted with your letter of February 18, 1884, and again submitted September 19, 1884, with corrections and amendments, also with remarks made in response to criticisms of this department thereon, having been further examined, is herewith returned approved.

Very respectfully, H. M. TELLER, Secretary.

162. Citizens or persons not Indians, who have not been adopted by the tribal authorities, have no legal status in an Indian tribe unless they are specially provided for by treaty or special act of Congress, and cannot therefore share in any annuities paid to an Indian tribe. (§ 87 Ins. 1880.)

26 DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *December* 5, 1893.

The Secretary of the Interior.

SIR: The inclosed office letter of February 21, 1893, is respectfully returned to the department with advice that the accompanying regulations have been reconsidered and revised as far as relates to rules for the government of courts of Indian offenses, and the rules for Indian schools have been removed and will be submitted for your consideration and approval in separate form.

Very respectfully, your obedient servant,

FRANK C. ARMSTRONG,
Assistant Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *December* 28, 1893.

The Commissioner of Indian Affairs.

SIR: The revision of the regulations of the Indian Department submitted with your letters of February 21, 1893, and 5th instant, has been examined and is herewith returned approved except as to the following clause: "Indian women married to white men, or to other persons not entitled to the benefits of this act, will be regarded as heads of families. The husbands of such women are not entitled to allotments, but their children are." This clause should be omitted.

Very respectfully, HOKE SMITH, *Secretary.*

157. Persons not Indians, unless adopted by the tribal authorities, which adoption must be approved by the Indian Office to be valid, or unless they are specially provided for by treaty or special act of Congress, have no legal status in an Indian tribe and can not share in any annuities paid to said tribe. (Sec. 162, Reg., 1884.)

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *March* 1, 1904.

The following regulations governing the management of affairs growing out of Indian relations are promulgated for the information and guidance of all concerned, and will supersede those of 1894 on April 1, 1904.

Indian agents and all other officers of the Indian Department are enjoined to carefully study the regulations herein set forth and to render a strict compliance therewith in every particular.

Papers or accounts not made out in the prescribed form may be returned to the officer by whom prepared for restatement while a continued disregard of the regulations laid down on the
27 following pages will render the offender liable to suspension or removal from office.

W. A. JONES,
Commissioner.

Approved:
ETHAN A. HITCHCOCK,
Secretary of the Interior.

327. Persons not Indians, unless adopted by the tribal authorities, which adoption must be approved by the department and the Indian Office to be valid, or unless they are specially provided for by treaty or act of Congress, have no legal status in an Indian tribe and cannot share in any annuities paid to said tribe.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *June* 7, 1895.

The honorable the Secretary of the Interior.

SIR: I have respectfully to submit, for your information and consideration, a letter dated April 8, 1895, from Captain F. D. Baldwin, U. S. A., acting Indian agent of the Kiowa &c. agency, Oklahoma, relative to adoptions by certain Indians of the Kiowa &c. Agency of certain persons to membership with them.

The said communications of April 8, from Capt. Baldwin, is a report in reply to letter from this office dated January 7, 1895, which I quote at length for your full information as follows:—

"I am in receipt, by reference from Hon. D. P. Flynn, of a communication, dated the 14th ult., from Mrs. Philomene Purdy who states that her mother was an Indian woman of the Sac tribe; that she did not get an allotment of land with the said tribe for the reason that her grandparents were driven away by these Indians for aiding the whites in the Sac and Fox war; that she is now living with the Wichita and Caddo Indians by whom she and her three sons were adopted last winter; that there is some objection made against such adoption by some white men who are married in the tribe because it will be a few dollars out of their families; and she

asks if land cannot be allotted to them before the country is opened to white people."

Upon looking up the records in this office I find that the said Mrs. Purdy, under date of January 23, 1893, applied to this office for an allotment of land with the Kickapoo Indians, with whom she was then living, and was advised by this office on February 25, 1893, that unless she was a member of the Kickapoo tribe or had been legally adopted by the said tribe, with the sanction of the department, she was not entitled to an allotment of land on the Kickapoo reservation.

On December 9, 1893, Capt. Brown, the then acting Indian agent of the Kiowa &c. agency, transmitted to this office the proceed-
28 ings of a council of the Wichita, Caddo and affiliated bands of Indians adopting Mrs. *Prudy* (presumed to be Purdy), Frank Prudy, Earl Prudy and Vernon Fred Prudy, to membership with them, and asked instructions from this office relative to placing their names upon the rolls of the said Indians. In reply he was instructed by this office under date of December 23, 1893, that

"Before this office would be willing to take any action in this case, looking to the placing of the names of these persons upon said rolls, more information will have to be furnished. No reason whatever is given in the proceedings why these parties should be put upon the rolls of the said tribes. If the office took favorable action in every case where Indians recommend that enrollments of outsiders be made, there would be no end to them. In exercising its function as guardian of the different Indian tribes, the Government has found it necessary to protect them from scheming white men and others who, for the sake of land and money benefits that they hope to secure thereby, seek admission into such tribes as members thereof. The office is careful, therefore, to see that Indians are not imposed upon in any such manner.

'I do not mean by this to convey the idea that the present applicants have any such motives, but, to satisfy a rule of the office which past experience rendered it necessary to establish, some good and thoroughly sufficient reason must be advanced why favorable action should be taken in the present case.'

"However, Capt. Brown failed to make a further report to this office concerning the said adoptions, and, under date of February 20, 1894, Lt. Maury Nichols (your predecessor) was instructed as follows:

'I enclose herewith a communication from your predecessor, Capt. Brown, dated December 9, 1893, in which he transmitted to this office the proceedings of a council of the Wichitas, Caddos, and affiliated bands, held at this agency October 16, 1893, at which Mrs. Prudy, Frank Prudy, Earl Prudy, Vernon Fred Prudy, John Hansel, Willie Hansel, Nellie Hansel, Allen H. Sloan, Mrs. Curtice, Miss Curtice and Mrs. Dowing, were adopted as members of said tribes including an equal share in the lands and annuities.

The office under date of December 23, 1893, wrote to Agent Brown for further information concerning these adoptions, to which as yet,

no reply has been received. You will therefore examine your files, and after reading this letter comply with its instructions.

In this connection I also enclose a communication dated the first ultimo, from Ellen Sloan, who states that she was adopted by the above mentioned council and would like to know if this office has approved the same.

This is sent you for your recommendation and report. You will with such report, return the two enclosures.'

" In connection with the above mentioned Hansels, it is presumed by this office that this is the same family that attempted to
29 secure enrolment and adoption with the Indians of the Cheyenne and Arapahoe agency, Oklahoma, in 1892.

Under date of March 31, 1891, one Christian Hensall applied to the agent of the Cheyenne and Arapahoe agency stating that he, a white man, had married a Pitt River (Cal.) Indian by whom he had four children—Ellen F. (now Mrs. E. F. Sloan), Nellie K., John and William Hensall; that his ' first ' wife died in California in 1877; that he afterwards married a Cheyenne woman of the Cheyenne and Arapahoe agency who died in 1879, without issue; and asking that his children, if entitled thereto, be adopted into the said tribe of Indians and be given allotments of land with them.

Under date of February 24, 1892, seven Indians, ' chiefs and headmen ' of the above agency, signed a paper purporting to adopt the said children of Christian Hensall. However, a majority of the said tribe of Indians afterwards—during their negotiations with the Cherokee Indian commission for the sale by them of certain of their lands—objected to the said Hensall children becoming parties to the transaction, and refused to recognize them as having any rights whatever with their tribe. In view of this objection the matter was referred to the Secretary of the Interior, under date of April 8, 1892, for his decision. The Secretary, under date of April 20, 1892, decided that the said applicants were not entitled to enrolment or adoption with the Indians of the Cheyenne and Arapahoe agency.

Up to the present time no reply has been received to the above instructions to your predecessor.

Further, Lt. Nichols, under date of February 19, 1894, transmitted to this office, without remarks or recommendation, papers marked ' A,' ' B,' and ' C,' being apparently the proceedings of councils with the Wichita, Caddo and affiliated tribes of Indians, in which they asked permission to adopt into their tribes certain persons, 29 in number, 18 to have full benefits of land and annuities, and 11 to have land only. I am unable to state whether or not these council proceedings contained the names of Mrs. Purdy and her sons, for the reasons that the papers were returned to acting Agent Nichols by this office under date of March 3, 1894, and he was instructed to take further action in the matter as follows:

The reasons assigned by the Indian council for desiring the adoption of the eleven persons on list ' A ' are that ' they are Indians from other countries and have lost their rights and have no land unless we give it to them.'

The reasons as to list 'B,' which seems to be a list of thirteen white persons, are that, 'they have married our daughters and in so doing have become our sons and part of our people.'

As to list 'C,' embracing five names, the reasons given are 'that they have married Indian men of our tribes and have become our sisters in so doing—4 married women and one minor child.

In reply I have to say that it is not customary for this office to recognize and take action upon council proceedings of Indian tribes in matters of such importance, unless the councils are regularly called, with the knowledge of the agent and certified by him to be the action of the council and that such action is expressive of the wishes of the tribe.

The papers forwarded by you, purporting to be the action of the chiefs and headmen of the 'Wichita, Caddo and affiliated bands,' are altogether informal, all apparently in one handwriting—including the signatures of the 'chiefs and headmen' without witnesses or agent's certificate, although it is true they appear to have been subscribed before a U. S. commissioner whose seal is affixed.

There is nothing to show that the council was a proper one; that it had any authority to act; that it represented the tribes or that its action expressed the wishes of the majority. It is not shown even that it was an open council to which the Indians generally were invited. Now as to the adoption of these people I have this to say:

Article V of the agreement of June 4th, 1891, with the Wichita and affiliated bands, which is now before Congress for its action provides as follows:

* * * 'Provided, if any sum of money shall be allowed by Congress for surplus lands, it shall be subject to a reduction for each allotment of land that may be taken in excess of one thousand and sixty (1,060) at the price per acre, if any, that may be allowed by Congress.'

This provision should be fully understood by the Indians before passing upon the question of the adoption of the 29 people referred to. For every allotment taken in excess of 1060 a reduction will be made from the purchase price paid them, for each allotment taken in excess, at the rate per acre allowed for their surplus and this should be made clear to the Indians.

It is not seen what good reason there is for foisting the 11 people reported on list 'A'—being Indians from other tribes—upon the Wichitas and affiliated bands, excepting possibly Jane Shirley who it appears has been living with them since 1855. Still if they are Indians and have no land elsewhere there may be some excuse for it, the Wichitas, &c., being willing.

There is better reason perhaps in the case of the women who have married into the tribe, as reported on list 'C.'

The 13 on list 'B' seem to be white men (possibly some are mixed bloods) who have married into the tribe. Of some of these it is stated that they have large families. Now if their wives and children get 160 acres each, when allotments come to be made — the pending agreement, with other tribal benefits, as they undoubtedly

will, being members of the tribes, the propriety of admitting the white fathers to membership with full rights in lands and annuities is at least doubtful.

I desire you to lay these matters before the chiefs, headmen and principal men of the reservation, and if, after full discussion
31 it shall seem to be the general desire to have these 29 people adopted into the Wichita and affiliated tribes, then let a council be called and formal action taken to that end.

The correct name for each applicant for adoption should be given, with age and sex and a brief statement as to who the applicant is, where from, his fitness to live amongst the Indians, and any other information to enable this office to deal intelligently with each case and decide for itself as to the justice and wisdom of recommending the approval of the adoptions or either of them.

Your own views and recommendations for or against, in each case, would be of value to this office and are desired as far as you may be able to offer them.'

In view of the fact that no reply has as yet been received in answer to the above office instructions, and that considerable time has now elapsed, you will, as soon as convenient, take up the cases in question, carefully investigate the same and make report upon them to this office, as per quoted instructions to your predecessors."

The acting agent in his said report of April 8, states that on February 21, 1895, he called an open council of the Wichita and affiliated bands of Indians of the Kiowa agency, at which the matter of adoptions was carefully explained to them, after which they took action on each case presented, as shown by the council proceedings which he encloses with his report. The said council proceedings show that the Indians, of whom 35 were present, voted as follows on the names of persons submitted to them for adoption:

White Women Married Into Their Tribe.

* * * * * * *

White Men Married Into Their Tribe.

* * * * * * *

	Ayes	Nays.
Willis West.....	13.	17

* * * * * * *

The acting agent states in regard to the above that he approves the action of the Indians as shown by their votes in their adoption of the white women, excepting Nannie Shirley; that as to the white men, he can only approve of the adoption of Dr. J. J. Sturm, Robert Lee Curtis and William Shirley; that as to the persons claiming to belong to other Indian tribes, he approves the action of the Indians as shown by their votes in the said council proceedings.

He further states that most of the white men whose names were presented to the Indians have in many ways shown that their only reason for being on the reservation, or for marrying squaws, has been simply to obtain privileges which most deserving whites are deprived of, or in other words, that their only object and aim
32 has been of a mercenary character; that several of them have become wealthy and now have under fence great tracts of land for which they do not and never have paid grass rent.

It is noticed that the said acting agent only recommends the approval of this department of the adoptions of Blanche Williams, May Curtis, May Downing, Dr. J. J. Sturm, Robert Lee Curtis, William Shirley, John Hansel, Mrs. Philomin Purdy, Frank Purdy, and Wm. Corett—10 persons in all.

It has been and is the policy of this office to refuse to recommend the approval of the adoption by Indians of white persons or others, unless good and sufficient reasons exist therefor; as it is the desire and aim of this office to carry out the policy of the Government in causing, so soon as possible, the breaking up of tribal relations; the taking of lands in severalty by the Indians, and their assimilation into our civilization as citizens of the United States. I do not therefore think that it would be wise to sanction the adoption of persons—whites or Indians of other tribes—by Indians into their tribes, thereby increasing the same unless for exceptionally good reasons, which is not shown to be the case in the adoption of any of the above named persons by these Indians. It is the policy of this office to break up their tribal relations by making citizens of Indians, and not to increase their numbers by making Indians of citizens. Further, experience has shown that it is a very, very easy matter to influence Indians by bribery and otherwise to adopt whites and others into their tribes; and that in a great many cases where adoptions have been made, it has resulted in benefitting only the persons adopted.

I would therefore recommend, that all of the above adoptions be disapproved, and this office be directed to notify the acting Indian agent of the Kiowa &c. agency to that effect.

I enclose herewith all of the papers in the case, with request that the same be returned to the files of this office.

Very respectfully, your obedient servant,

D. M. BROWNING,
Commissioner.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *April* 18, 1901.

The honorable the Secretary of the Interior.

SIR: This office has the honor to acknowledge the receipt, by department reference of January 30, 1901, for consideration and report, of a letter without date from Wm. C. Shelley, attorney-at-law, who submits the application of Mr. Willis C. West, a white man, for the correction of the Wichita tribal rolls, Kiowa agency,

Okla., to the end that he may be re-enrolled as a member of the Wichita tribe of Indians.

The said attorney states that this man married a Wichita
33 Indian woman (in 1891) and was duly recognized as a member of her tribe according to its usages and customs; that when the agreement of June 4, 1891, was made with this tribe of Indians he signed the same as an Indian, his signature being No. 101; that he was regularly on the rolls of the tribe at this time; "else his signature had not been accepted by the commission;" that his name is found on the roll of per capita payments made to this tribe in March, 1894—the first roll of such payments—and it also appears on the similar roll of 1895; that having been thus fully recognized as an Indian he needed no further recognition; that in the early part of 1895 some parties, interested in getting their names on the rolls of the tribe, caused a council of the Wichita and affiliated bands of Indians to be held at which the names of some 29 persons were submitted for admission—among them being the name of his said client, which was submitted without his knowledge or consent; that these applications or adoptions were forwarded to this office and the cases sent to the department under date of June 5, 1897, with the recommendation that all of them be disapproved; that the department disapproved all of them on February 7, 1898; whereupon this office directed the Indian agent of the Kiowa agency to "inform all parties interested of this action in the premises;" that under this direction the Indian agent struck the name of the said applicant from the Wichita tribal rolls, which name was already on the rolls by previous tribal and departmental action; and that the department was not at this time advised that this man was already on the rolls, and this disapproval of a subsequent council action could have no effect upon him as his rights had vested.

Mr. Shelley adds that there can be no doubt that the name of his client was lawfully and properly on the rolls on June 4, 1891, on which date the tribe to which he belonged signed an agreement with the United States for the sale of its lands, and by the 5th section thereof (28 Stat., 396) provided—

That 1,060 allotments should be deducted from the lands so sold, which number, 1,060, was the total tribal membership, native and adopted, at that time. Mr. West *being then on the roll*, his allotment was here expressly provided for, and the agreement being ratified by Congress, his right to an allotment as an adopted Indian became vested with such ratification, by congressional enactment, if it had not been before by tribal action and departmental sanction.

In reply I have respectfully to state that under date of February 7, 1901, the case was referred to Lt. Col. J. F. Randlett, the Indian agent of the Kiowa agency, for a full investigation and report, and with the following instructions in the premises:

* * * It might be well to have Mr. West make an affiadvit before you, giving the facts in full as to his case. He should state when he married the Wichita women, and when and under what circumstances he was recognized as a member of the tribe. Fur-

ther, you will ascertain from the chiefs and headmen of the
34 Wichita and affiliated bands just when they adopted him and considered him a member of the Wichita tribe. It is also desired that your report show when he was first placed upon the Wichita tribal rolls, and how long he has participated in rights with them.

Under date of the 15th ultimo Agent Randlett made reply with which he transmitted an affidavit from the said applicant relative to his case, and stated as follows relative to Mr. West's name being found on the records of the agency under his charge:

Mr. West's name first appears upon the records of this agency on the retained copy of grass payment roll of the Wichita tribe dated March 31, 1894 (Lt. Maury Nichols, U. S. A. acting Indian agent), as No. 366 composing Wichita family No 192, but no payment was made to said West upon this roll, neither is any authority cited for placing his name thereon as a member of the Wichita tribe. This was the first payment roll of which the agency has any record pertaining to the Indians of the Wichita Indian reservation. Upon this same roll appears the Indian name of Cora Caruth, the woman Mr. West claims to have married on February 16, 1891. Her Indian name was Ke-a-sun-ni-as and under this name she appears as No. 75 and head of Wichita family No. 34, on the payment roll of March 31, 1894, referred to above. On this roll family No. 34 is shown to consist of Ke-a-sun-ni-as, and Sas, recorded as the daughter of Ke-a-sun-ni-as and two years of age. No mention is made on this roll that Willis West, comprising Wichita family No. 192, is the husband of or in any manner connected with Ke-a-sun-ni-as, the head of family No. 34.

The Wichita grass payment roll dated March 27, 1895 (vou. 30, Abs. Dis. 4th quarter, 1895, Capt. Frank D. Baldwin, U. S. A., acting Indian agent), shows Willis West as No. 391, and head of family No. 192, and that at this payment Mr. West received a pro rata payment of $5.00 his receipt therefor being by mark. This roll also contains the name of Ke-a-sun-ni-as comprising the family. Neither on this roll does any notation whatever appear to show that Willis West was the husband of Ke-a-sun-ni-as (Cora Caruth or West) or by what authority he was entered upon the roll other than evidence that it is copied from the roll of March 31, 1894.

Upon the Wichita grass payment roll of January 31, 1896 (vou. 80 Abs. Dis. 3rd quarter, 1896, Capt. F. D. Baldwin, U. S. A., acting Indian agent), the name of Willis West appears as No. 381,—head of family No. 192, which family was composed only of West. On this roll West received $4.10, for which he receipted by mark. The name "Cora West" appears as No. 85 and head of family No. 34 on this roll, with note that Cora West was ("Ke-ah-sun-ni-as, last roll"—referring to the roll of March 27, 1895. A note also appears in margin after name of "Sas," who is enrolled as daughter of Cora
35 West, to the effect that Sas is daughter of No. 54 Wichita, and No. 54 Wichita is found on same roll to be Mis-se-nah, a woman 28 years of age at time of payment.

On Wichita grass payment roll of February 13, 1899, * * *

the name of Mr. West does not appear except in a note in the remarks column opposite the name of Cora West, who is enrolled as No. 132 comprising family No. 30, which note is as follows: "Wife of Willis West, adoption of Willis West disapproved." Search of the agency records discover- that the adoption of Mr. West was disapproved in office letter dated Feb. 10, 1898.

On none of the rolls of this agency where Mr. West's name appears does it appear as a member of the same Indian family as the name of the woman claimed as his wife, and at no place in the records of the agency have I been able to discover that there was ever any authority for Lieut. Nichols to place Mr. West's name on the rolls of the Wichita tribe of Indians as appears in the first instance of such record, and afterwards continued until shut off by direction of Indian Office letter above referred to.

The agent added in this case that on March 13, 1901, the chiefs and headmen of the said bands were assembled at the agency office, and were unanimous in the expression of the wish that the adoption of this white man, as voted upon by them in general council of March 23, and 24, 1897, "may receive the approval of the department and that his name be duly enrolled as a member of the Wichita tribe of the affiliated bands;" that there is every evidence that the Indians at the council of March, 1897, adopted Mr. West in good faith as recorded in the report of such council; that there is no objection known to exist, so far as he can discover, to the character of this man, or any legal reason why his adoption should not be approved; and he therefore submits the case to the favorable consideration of the department.

In the affidavit dated February 27, 1901, of Mr. West, he states that on February 16, 1891, he married Cora Caruth, a member of the Wichita tribe of Indians; that from and after this date he was recognized by the Indians of this tribe as a member thereof; that subsequently his name was duly entered upon the grass payment rolls of the said tribe, and he received for some time his pro rata share of grass moneys paid to the Wichita tribe; that his name continued to appear upon the said tribal rolls until this office in letter dated February 10, 1898, advised the Indian agent of the department's action in denying the application of 29 persons for adoption, whereupon he was informed by letter that his name had been dropped from the said rolls by direction of the department, and that he is of the opinion that the department did not have the full facts in his case when it took action on the adoption cases of the 29 persons.

As the agent failed in this letter (of the 15th ultimo) to ascertain as directed information on one of the salient points in the case, he was on the 30th ultimo instructed by this office as follows:

> In my said instructions of Feb. 7th last, you were advised in
> 36 effect that the claim was made in this case that the said applicant alleged to have been recognized by the tribe according to its usages and customs soon after his marriage with a Wichita Indian woman in 1891, and his name therefore placed on the tribal rolls; that when the adoptions of 29 persons by the said tribes were made or voted upon in council of February 21, 1895 (which included

his name), he was already a member of the tribe and his name was included in the said 29 without his knowledge or consent; and that his rejection by the Indians by a vote of 17 nays to 13 ayes had no bearing on his rights, and the subsequent disapproval of his adoption by this department and the striking of his name from the tribal rolls was an error.

You were therefore "instructed to ascertain from the chiefs and headmen of the said Wichita and affiliated bands just when they adopted him and considered him a member of the Wichita tribe."

As this desired information is not given, please have the leading chiefs and headmen make a formal statement before you, stating whether or not they considered him a member of their tribes just after his marriage to the Wichita woman, and if he was given full tribal rights and so considered from 1891 to 1895 when the tribe voted against his adoption; or if they did not consider him a member of their tribes and entitled to full tribal rights until his adoption of March 23, and 24, 1897.

I am now in receipt of the agent's reply, dated the 6th instant, in which he states that on the 5th instant he called a council of the chiefs and headmen of the said tribes, and asked them the straight question: "Had they ever considered a white man who had married into their tribes entitled to become a member of their tribes and to enrollment and rights with them?" that each of the chiefs and headmen made separate reply, each and every one stating that they had never considered a person married into their tribes entitled to be enrolled as a member of their tribes until he had been voted upon and so elected by a majority of the male members of their tribes; that he then asked them if they considered Willis C. West as a member of their tribes and entitled to enrollment, to which each replied that they considered his case the same as any other, and that he was only entitled to be enrolled with them by formal adoption the same as other persons who had married into their tribes, and that they would now like to have his adoption approved as voted for at the council of March 23, 1897.

As to the history of the present applicants' former adoption by the said Wichita and affiliated bands of Indians, the records of this office show that under date of April 8, 1895, Capt. F. D. Baldwin, acting Indian agent of the Kiowa agency, forwarded to this office the formal proceedings of a council of the said Indians held February 21, 1895, at which the cases of 29 persons were voted upon for adoption with their tribes,—among them being that of Mr. West; and in
37 this council record it is stated that he (West) had resided with them since 1882, and had married one of their women in 1891, and that the vote taken in his case was 13 ayes to 17 nays. The agent stated in transmitting the said council proceedings that as to the white men adopted, he could only approve of the adoption of Dr. J. J. Sturm, Robert Lee Curtis and William Shirley; and that with the exceptions noted he approved the action of the council as shown by their votes.

The proceedings of this council, together with the agent's report in the premises were submitted to the department in office letter

dated June 7, 1895, with recommendation that all of the applications for admission to the said tribes by adoption, including that of the present applicant, be denied, for reasons therein given. Under date of February 7, 1898, the department denied all of the applications, including that of Mr. West, giving as reasons that it is—

the policy of the department to discourage the adoption of whites into Indian tribes with whom they have no blood relation and have never had any connection unless for exceptionally good reasons, which do not appear in any of these cases.

On March 23 and 24, 1897, the Wichita and affiliated bands held a council in which the question of the adoption of the said Willis C. West was again brought up and voted upon, with the result as shown in the said formal council procedings, as follows:

By the AGENT: The names of several parties have been recommended for adoption as members of the tribes on this reservation. It rests with you whether these people shall be adopted and become a part of and be numbered with you and have all the privileges with the rest of your people or not. The majority will rule as to whether they shall become members of your people. We will vote on them one at a time * * * Willis West: 92 in favor and 24 opposed.

However this last action of the said Indians in council was not submitted to the department until recently, as at the time, the council was held, the cases of the adoptions of the 29 persons above referred to were still pending before your office.

From the facts in the case it appears that Willis C. West, a white man, went among the Indians of the Wichita reservation in 1882, and in February, 1891, married Cora Caruth (Ke-ah-sun-ni-as), a Wichita Indian woman; that in 1891 he signed the agreement with these Indians, negotiated June 4, 1891, and confirmed by act of Congress approved March 2, 1895 (28 Stats., 876); that his name first appears upon the Wichita tribal rolls (grass payment roll) in March, 1894, but he was not paid at this time; that it was placed upon the said roll presumably by Acting Agent Nichols, but there was no authority for such enrollment; that he was paid a pro rata share of the grass money in 1895 and 1896, and his name was con-
38 tinued on the Wichita rolls until department action of February 7, 1898, disapproving the 29 adoptions, when it was taken off by the Indian agent.

As to his claimed adoption in 1891 soon after his marriage with the Indian woman, the facts show that there was no formal vote upon his application for adoption until the council meeting of February 21, 1895, at which he was rejected by the tribes; that the Indians themselves did not consider him a member of their tribes and entitled to enrollment with them after his said marriage, they stating that they considered his case the same as any other, and that he was not entitled to be enrolled with them until formally adopted, the same as other persons who had married into their tribes; that he was adopted by a vote of 92 to 24 at the council of March 23, 1897, though no reason is given for his adoption except that he is a white man who married one of their daughters in 1891; and that these In-

dians still desire the approval of his adoption of March 23, 1897, which they made in good faith.

In this case I find from the facts presented that the said applicant was not as claimed adopted by the Indians of the Wichita and affiliated bands soon after his marriage to a Wichita Indian, and was erroneously placed upon the Wichita tribal rolls in 1894 by the acting agent, there being no formal adoption by the Indians nor other authority therefor; that the Indians in their council of February 21, 1895, rejected his application for admission to their tribe, and the agent very properly struck his name from the tribal rolls in 1898; and that his application for re-enrollment upon the grounds of vested rights and that the department was in error in disapproving his adoption in 1895, is not sustained. I must therefore recommend that his application for correction of the said Wichita tribal rolls by placing his name thereon, be denied.

While the said attorney does not ask that the action of the Indians in voting favorably upon his adoption in March, 1897, be considered, yet as the Indians themselves have requested that this department take action in the matter, it is thought best to consider this phase of his case. When the Indians voted upon the question of his admission to their tribe in 1895 it was stated that he had been living with them since 1882 and had in 1891 married one of their people. However, they rejected his application, and when the case was passed upon by the department it was held that "exceptionally good reasons" did not exist for his adoption and admission to membership as a Wichita Indian. His more recent adoption of March 23, 1897, by a vote of 92 to 24, which has not as yet been passed upon by the department, does not give any further reasons for his admission to the said tribe. However, the chiefs and headmen assembled in council at the agency office state that they would like to have his adoption approved by the department; and the agent reports that "there is no objection known to exist, * * * to the character of Mr. West,
or any legal reason why his adoption should not be approved,"
39 and recommends favorable consideration. Nevertheless I do not think that the reasons given—residence with the Indians since 1882 and marriage into the tribe in 1891—should, in the absence of evidence to show any consideration or services rendered the tribe, are such as should entitle him to receive benefits with the Wichitas. This office, therefore, sees no reason to recede from its unfavorable recommendation in this case made in letter to the department dated June 7, 1895.

All the papers in the case are enclosed herewith with recommendation that the same be returned to the files of this office.

Very respectfully,

A. C. TONNER,
Acting Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *February* 7, 1898.

The Commissioner of Indian Affairs.

SIR: I am in receipt of your letter of the 12th ultimo, calling attention to a communication from your office dated June 7, 1895,

in the matter of the application of certain persons (29 in number) for membership, by adoption, with the Wichita and affiliated bands of Indians, and asking for instructions in the premises.

In seems that eighteen of the above named persons are whites who have married into the tribe, and eleven are persons who claimed to belong to other bands of Indians—that most of the white man (14 in number) have shown that their only reason for being on the reservation, or marrying squaws, has been simply to obtain privileges which most deserving white men are deprived of, and that several of them have become wealthy and have under fence great tracts of land for which they do not, and never have, paid grass rent. Of the eleven who claimed to be Indians, but four received an affirmative vote for their adoption by the tribe in council.

In view of the policy of the department to discourage the adoption of whites into Indian tribes, and of Indians of other tribes becoming affiliated with tribes with which they have no blood relation and have never had any connection, unless for exceptionally good reasons, which do not appear in any of these cases, the recommendation of your office that these adoptions be disapproved, is concurred in.

All the papers in the case are returned herewith.

Very respectfully, C. N. BLISS, *Secretary.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *Dec.* 13, 1884.

The Commissioner of Indian Affairs.

SIR: I return herewith the enclosures which accompanied your report of the 12th instant in relation to the action of the Quapaw Indians in the Indian Territory, in assuming the right to adopt into their tribe, and allow rights upon their reservation to other
40 Indians and white persons whose presence among them is detrimental to their peace and welfare.

Agreeably to your recommendation authority is hereby granted for the removal from the lands of the Quapaws, under section 2149 of the Revised Statutes, of all such persons whose presence thereon is detrimental to the peace and welfare of the Indians; and the Quapaws should also be informed through their agent that their action in the measures of adoption taken by them is disapproval by the department, and that whenever they desire to adopt any person or persons into their tribe, the case with all the facts necessary for determination, must be *ad*mitted through their agent to your office for the action of the department, and that applicants for adoption, pending the decision of the department, must be kept off of the reservation.

Very respectfully, M. L. JOSLYN,
Acting Secretary.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *September* 8, 1900.

The Commissioner of Indian Affairs.

SIR: I am in receipt of your letter of the 14th ultimo, in which you submit, for the consideration of the department, a communica-

tion from Col. James F. Randlett, Indian agent of the Kiowa agency, Oklahoma, dated March 10, last, reporting on the application of H. P. Pruner, (submitted by Mr. W. C. Shelley, attorney at law of this city) for admission, by adoption, to membership in the Wichita and affiliated bands of Indians of the Kiowa agency.

Mr. Shelley in his letter of February 26, 1900, states that Mr. Pruner married a Delaware Indian woman many years ago, and is now the head of a family; that he was duly adopted into the tribe, according to its laws and usages, and his name placed on the roll of membership thereof by the U. S. Indian agent; that the exact date of his adoption cannot be given, because the records of the agency do not seem to have been very carefully kept, or preserved, until within the last five or six years; that his name is found on the census roll of the Delaware tribe now on file in your office, for the year ending June 30, 1897, as number seventeen, that from the time of his marriage and adoption up to 1895, no question was ever raised in any quarter as to his Indian rights, but that he was in full and undisturbed enjoyment of the same; that in the spring of 1895, after the tribal reservation had been sold to the United States, a number of white men who had more recently intermarried with said tribe, but had never had their tribal rights recognized, and others, caused a council of said Indians to be held, and secured the adoption at that council of some twenty-nine persons; that without Pruner's consent or desire, his name was included in the list, notwithstanding that he was then a full member of the tribe by former adoption and recognition by the department; that upon the recommendation of
41 your office, the department under date of February 7, 1898, disapproved the adoption of all, mentioning none by name, but disposing of them as a lot, and the Indian agent, February 10, 1898, was directed to "inform all parties interested of this action in the premises," and the agent proceeded to take Mr. Pruner's name from the rolls. Mr. Shelley claims that when the above mentioned "adoptions" were submitted to the department for approval, it was not informed that Pruner was already on the rolls by prevjous adoption and departmental approval, and that, had the department been fully advised as to the facts in the case, a different ruling would have been made, and that the facts in Pruner's case are "practically identical with those set up" in the case of John Downing, upon which the department took favorable action.

Agent Randlett, of the Kiowa agency, in reply to the statements made, reports that the facts in Mr. Pruner's case, so far as he can learn from the records of the agency, and from Pruner's own statements, are, that he came to live with the Delaware Indians in the fall of 1871, and in 1875 married Lucy J. Osborn, a full blood Delaware woman, with whom he has since lived, and now has two children, that he admits that he has never attended a council of said Indians, and has no knowledge of his ever having been formally adopted previous to the council proceedings of June 7, 1895, but that previous to this council some Indian agent, whose name he does not remember, had told him that he had been adopted. The agent further reports, that he can find no record in any of the files of the

agency wherein said applicant is shown as ever having been adopted by the Wichita and affiliated bands, except a note in red ink on an old census record book, where occurs his name, with the remark: "Adopted by the council held with Cherokee commissioner at Anadarko;" that there is no date as to when this remark was entered, nor evidence by whom it was made; that his name does not appear on the grass payment rolls of 1894, 1895 and 1896; that he has never been paid any of the grass money which these Indians have received from leases of their lands; that in fact there is nothing upon the records to show that Mr. Pruner's name was previously borne upon the rolls as a member of the Delaware tribe, as claimed by him, and that, therefore his claim intimating that he has received full tribal rights as a member of said tribe, from the time of his marriage in 1875 until 1895, "is not warranted by the facts."

The agent further states that the fact that Mr. Pruner signed the agreement with the Wichita and affiliated bands, of June 4, 1891, "by permission of the commissioners" only shows that said commissioners were not particular in ascertaining what persons, before signing the agreement, had a legitimate right for so doing.

Relative to the charge made that the agent took unwarranted action in striking Mr. Pruner's name from the rolls, in accordance with the decision of the department, Colonel Randlett says that the only reason for Pruner's name appearing on the census roll of June
42 7, 1897, "was his embryo adoption shown in the record of the council of March 24, 1897," and that any action in taking his name from the roll, in view of the department's decision in the premises, was entirely correct, because his name "was never stricken from any roll of this agency which was there by previous tribal and departmental action," and he concludes by saying that "to open the door for the entrance of the crowd of persons interested in the result of this case, as it has been represented to the department, would result in unending appeals, most of which would be shown to be without the least foundation."

Under date of July 31st, last, your office called upon Agent Randlett for additional information in regard to any issue of clothing, subsistence, or annuity goods to Mr. Pruner, prior to 1891, and he reports that the records of the agency for 1891 and prior years, are very incomplete, but "search through the papers that are available, shows that annuity goods, subsistence, clothing, etc., were issued to Mrs. Pruner as the head of her Indian family. No record was found where issues were made to H. P. Pruner." The agent further states, that some of the census books for years prior to 1891 were found, "but Mr. Pruner's name does not appear in them. The name of Mrs. Pruner appears, as do the names of her children by her former husband, one Osborn, and also by Mr. Pruner;" that the census records for 1891 contain the name of Mr. Pruner," but it is not entered with the names of Mrs. Pruner and her children." Mr. Pruner's name is alone as constituting "a family apart from that of his wife. In this record for 1891, no note appears stating the reasons for the entry of his name upon the census book as a member of the Wichita and affiliated bands of Indians."

"In the general record book for the names of Indians of this agency, the name of Mrs. Pruner appears at the head of the family composed of Mrs. Pruner and her children, and in the margin, opposite Mr. Pruner's name, is this note, in red ink: "'Adopted at council held with Cherokee commissioner at Anadarko.'"

In submitting this case for the consideration and decision of the department, you say that, from the facts in the case, it would appear "that the applicant, who is a white man, went among the Delaware Indians residing on the Wichita, etc. reservation, in about 1871, and a few years later married a full blood Delaware Indian woman; that he was allowed to make his home with her but took no part whatever in the council proceedings of these Indians as a member of the tribe; that in the summer of 1895 (about three months after the ratification by Congress of the Wichita agreement of 1891, providing for allotments, etc. to the said Indians,) there was an attempt made on the part of a number of persons living among the said Indians to secure admission to the tribe by adoption, at which time some 29 were voted upon in a full tribal council, among them being Mr. Pruner, who was rejected by a vote of 14 in favor to 17 against admission; that this council's action in rejecting him
43 was approved by the department February 7, 1898; that prior to this council of 1895, he did not, as stated, sustain any tribal relations with these Indians or other right whatever, as is evidenced by the grass rolls of 1894, 1895 and 1896, which do not contain his name, although he appears to have signed the agreement of 1891, by the permission of the commissioners who negotiated the same; that in the spring of 1897, and while his case was pending before your office for a final disposition, another council of Indians was held, during which the matter of adoptions was brought up and his name again voted on by the Indians, with the result that 69 favored his admission and 47 opposed the same, but no recommendation seems to have been made by the agent as to this latest action of the council; that he has a good home upon the land which his wife has taken as her claim, and is in comfortable circumstances, and his wife and two children, who are members of the tribe, will no doubt receive land and other benefits with these Indians," and you add that this case is not "practically identical" with the case of John Downing, whose adoption was approved February 9, 1900.

The statement and other papers presented in the case of H. P. Pruner, who claims to be a member of the Delaware tribe of Indians, by adoption, have been carefully considered, and I find that his name does not appear on any of the rolls of the Wichita and affiliated bands of Indians prior to June 30, 1897, except on the census record of 1891; that the fact that he signed the agreement which was negotiated with said bands of Indians, June 4, 1891, cannot be accepted as establishing his right to membership in the Delaware tribe or with the affiliated bands, and that his claim that he was duly adopted into the tribe prior to June 4, 1891, according to its laws and usages, is not borne out by the evidence presented. While it appears that a council of the Wichita and affiliated bands of Indians was held at the Kiowa agency under the supervision of

Acting Agent Baldwin, on March 24, 1897, in which the adoption of a number of persons was considered and Pat Pruner was adopted; 69 in favor and 47 opposed, the proceedings of this counsel were not submitted to the department until July 14, 1900, when they were forwarded for consideration in connection with the present case. It has been the policy of the department to discourage the adoption of whites into Indian tribes, and of Indians of other tribes becoming affiliated with tribes with which they have no blood relations and have never had any connection, unless for exceptionally good reasons, and in view of this policy, I decline to approve the adoption of said Pruner by the council of the Wichita and affiliated bands, held March 24, 1897, and decide that he is not a member of the Delaware tribe of Indians, which form a part of the Wichita and affiliated bands of Indians, and you will so inform the U. S. Indian agent of the Kiowa agency, Oklahoma.

The papers transmitted with your letter are herewith returned.

Very respectfully, THOS. RYAN,
Acting Secretary.

44 DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *February* 27, 1886.

Charles Hill, Esq., U. S. Indian agent, Santee agency, Nebr.

SIR: I have received your letter of the 2d instant, enclosing a petition from the headmen of that portion of the Ponca tribe of Indians residing in Dakota (on the old Ponca reserve now a part of the Great Sioux reserve), asking that they may be allowed to adopt the following named persons into their tribe:

Samuel Spider
Jenie Spider
Emily Spider
Kate Snake.

The petition states that the first three named are from the Yankton agency, and the last named from the Ponca agency, in Indian Territory, and that they are "of Indian blood." That is all the information given.

It ought to be apparent to you that the information furnished is entirely insufficient to enable this office to act intelligently upon a matter of so much importance. The promiscuous adoption of Indians of one tribe into another tribe is not countenanced by this office, and the adoption of whites, or persons having but a slight admixture of Indian blood, is discouraged, unless there are some peculiar circumstances attending the case which would justify a departure from that rule.

In the case presented by you, it is not known whether the persons named are full bloods or mixed bloods, nor to what tribe they belong, if to any, nor does it appear what object they have in desiring to be adopted by the Poncas, or why the Poncas wish to adopt them.

You will please state the facts to a full understanding of the case.

Very respectfully, A. B. UPSHAW,
Commissioner.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *April* 3, 1894.

Mrs. Jane Shirley, Minco, I. T.

MADAM: Referring to my letter to you of the 28th ultimo, relative to supposed adoption of your husband—the late Dr. John Shirley—in 1872 by the chiefs of the Comanche, Wichita and Caddo tribes of Indians, you are informed that after a further search of the records here, I find the following:

U. S. Indian Agent J. Richards of Wichita agency, under date of December 19, 1872, transmitted to this office, through Enoch Hoage, supt. of Indian affairs, the following request of certain headmen of the Comanche and affiliated Wichita Indians:

"We the chiefs and headmen of the Wichita and other
45 affiliated bands of Indians, and headmen of the Comanches, request and desire that the following named white persons may have a residence in the Indian country with all the rights and privileges, as regards property and settlement as are granted to Indians, to wit:

William Shirley of the Indian Territory, John Shirley, Chickasaw Nation, I. T., Philip McCusker, Ind. Ty. and Henry E. Alvord, of Virginia.

In witness whereof we have hereunto placed our marks the ninth day of the twelfth month (December) A. D. 1872.

ES-SE-HAB-IT, his x mark, *Chief, Comanches.*
TASH-A-WA, his x mark, " "
ES-SE-TU-I-OTT, his x mark, " "
KA-HAV-E-WAT, his x mark, " "
STRAIT FEATHER, his x mark, " "
DAVE, his x mark, " *Tawacanie.*
I-SAD-A-WA, his x mark, " *Wichitas.*
ES-QUITS-CHEW, his x mark, *2d Chief, Wichitas.*
LONG SALDEER, his x mark, *Headman Wacoes.*
WAH-LOOPE, his x mark, *Caddo Chief.*

Witnesses present,

T. CONNELL.
JNO. G. HAINES.

I certify that the chiefs and head men whose marks are hereunto attached met at the office of the Wichita agency and signed the foregoing request, Wm. Shirley, interpreting.

Wichita agency, I. T., 9th of 12th mo. 1872.

JONA RICHARDS,
U. S. Ind. Agent."

In reply to this, the office, under date of Jan. 4, 1873, instructed Supt. Hoage to the effect that it had always been the policy of the Government to permit white persons to reside with the Indians, but subject to removal in the judgment of the proper authorities; that such persons could not be adopted into an Indian tribe without legislation by Congress, which might, if had, overrun the Indian country with white persons, many of them lawless characters; that this office would not recommend such legislation; but that it had no objection to permitting white men who are proper persons to reside within the limits of an Indian reserve—this depending mainly upon the judgment of the agent—and use land the same as an Indian.

You will therefore see from the above that this office did not approve the request of these Indians that these men should be adopted into their tribes; but simply permitted them to reside upon the reservation and use land without any rights as Indians.

Very respectfully, D. M. BROWNING,
Commissioner.

46 DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *Sept.* 30, 1901.

Messrs. Davidson & Riddle, attorneys-at-law, Chickasha, I. T.

SIR: This office is in receipt of your communication of the 18th inst., in which you ask to be advised whether or not this department has any rules or regulations providing for the adoption of a United States citizen or a Mexican "into the Apache or Comanche tribes of Indians, and showing what it takes to make or constitute a legal adoption." Further, you ask if a Mexican captured when young by the said tribes with whom he has continued to live has by such capture and residence acquired a legal right with the Indians, and if he is entitled to enrollment with them.

In reply you are informed that this department has held and still holds that a person in order to acquire legal and vested rights with an Indian tribe must be formally and properly adopted by the tribe in council, and such adoption approved by the Secretary of the Interior.

As to the hypothetical case you submit, the office is unable to answer you, as it can not undertake to reply to cases of such an abstract character.

Very respectfully, A. C. TONNER,
Acting Commissioner.

Each of the papers so given in evidence by the defendant was objected to by the relator at the time each was offered, on the ground that said papers were not material to the issue of the case and tended to contradict material allegations of the petition which were not denied by the answer. But notwithstanding the said objections of relator duly interposed each of said papers was admitted in evidence by the court, and to the rulings of the court in admitting each

and all of said papers, notwithstanding said objections, exceptions were duly noted by the relator.

Thereupon the defendant having rested, the cause was submitted to the court.

Wherefore, in order that the foregoing matters and things which would not otherwise appear of record may be made so to appear, and that it may be made known that the foregoing constitutes all the evidence given in the course of the trial of this cause, the attorneys for the relator pray the court to sign this bill of exception, and the same is accordingly so signed by the court and made of record this 12th day of April, 1905.

JOB BARNARD,
Associate Justice, Supreme Court of the District of Columbia.

47 *Order for Record on Appeal.*

Filed April 18, 1905.

Samuel A. Putnam, Attorney at Law, Kellogg Building, 1416 F Street.

WASHINGTON, D. C., *April* 18, 1905.

Mr. John R. Young, clerk, etc., city.

DEAR SIR: You will please make up the record for the Court of Appeals in the case of The United States *ex rel.* Willis C. West, No. 44,853 at law, including the following papers and proceedings in the supreme court of the District:

Original petition and affidavit, rule to show cause, answer and affidavit of defendant filed July 11, 1902, motion for peremptory writ, same filed September 30, 1902, order over-ruling motion for peremptory writ, demurrer to respondent's answer, order over-ruling demurrer, pleas to answer, demurrer to pleas, order over-ruling demurrer to first plea and sustaining demurrer to second, third and fourth pleas, joinder of issue on first plea, bill of exceptions and final judgment.

Very truly yours, SAMUEL A. PUTNAM,
Att'y for Pl't'ff.

Service of copy of above acknowledged this 18th day of April, 1905.

J. C. ADKINS,
Of Counsel for Defendant.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 83, inclusive, to be a true and correct transcript of the record, as per

directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 44,853, at law, wherein The United States *ex relatione* Willis C. West, is relator, and Ethan A. Hitchcock, Secretary of the Interior, is respondent, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 16th day of May, A. D. 1905.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia supreme court. No. 1555. United States *ex relatione* Willis C. West, appellant, *vs.* Ethan A. Hitchcock, Secretary of the Interior. Court of Appeals, District of Columbia. Filed May 19, 1905. Henry W. Hodges, clerk.

48 WEDNESDAY, *November 8th, A. D.* 1905.

No. 1555.

UNITED STATES *ex Relatione* WILLIS C. WEST, Appellant,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.

The argument in the above entitled cause was commenced by Mr. S. A. Putman, attorney for the appellant, and was continued by Messrs D. W. Baker and F. H. Barclay, attorneys for the appellee.

THURSDAY, *November 9th, A. D.* 1905.

No. 1555.

UNITED STATES *ex Relatione* WILLIS C. WEST, Appellant,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.

The argument in the above entitled cause was concluded by Mr. W. H. Robeson, attorney for the appellant.

49 UNITED STATES *ex Relatione* WILLIS C. WEST, Appellant,
v.
ETHAN A. HITCHCOCK, Secretary of the Interior.

Opinion.

(Mr. Justice DUELL delivered the opinion of the Court:)

This is an appeal from an order of the Supreme Court of the District of Columbia, denying a writ of mandamus to require the Secretary of the Interior to approve the selection by the relator, Willis C. West, of 160 acres of land in the Wichita Reservation, in the Ter-

ritory of Oklahoma, under an act of Congress of March 2, 1895. The case was heard in the court below on issue joined on a plea interposed by the relator, the appellant here, to the answer of the appellee, the Secretary of the Interior, to the petition of the relator.

It appears that on August 5, 1901, the relator, claiming to be an adopted member of the Wichita Indian tribe, filed his petition in the Supreme Court of the District of Columbia, and rule to show cause followed.

In response, a demurrer to the petition was interposed, which, by an order entered August 27, 1901, was sustained, the rule to show cause was discharged, and the petition dismissed. Upon appeal that order was reversed by this court, and the cause remanded "for further proceedings therein according to law."

The defendant below filed his answer to the petition, wherein, among other things, after reciting the duty laid upon him, as Secretary of the Interior, in the premises, he averred that, being without knowledge of relator's status at the time of his application for allotment, defendant, as such secretary, examined and considered relator's application and all the evidence and proofs presented to him to support it, including all the matters now set forth in the petition, together with such other evidence and proofs bearing thereon as were embodied in the public records and files of the Indian Bureau and Department of the Interior, and that upon full consideration thereof the defendant, as Secretary of the Interior, did, on the 3rd day of July, 1901, reach and announce a conclusion and decision that relator was not, by nativity or adoption, a member of the Wichita and affiliated bands of Indians, and for that reason was not entitled to an allotment, and thereupon denied relator's application.

The relator filed motion for the issuance of the peremptory writ, and later a demurrer, which were successively overruled.

Relator thereafter filed his several pleas (four in number), to which defendant demurred, the demurrer being overruled as to the first plea and sustained as to the others; and on the first plea, as follows, issue was joined:

"The relator says that the defendant, as Secretary of the Interior, did not, by the decision alleged in the answer to have been made by him on July 3, 1901, decide that the relator was not by nativity or adoption a member of the Wichita or affiliated band- of Indians, and for that reason deny him the said allotment."

Upon this issue the cause was tried by the court, to maintain which issue, on his part, relator offered in evidence a duly certified copy of the Secretary's said decision of July 3, 1901, and defendant, on his part, offered in evidence official exemplifications of the correspondence, decisions, regulations, etc., alleged to be the ones referred to in his answer, as well as of the decision of July 3, 1901. To all save the last mentioned of defendant's evidence relator objected, and saved his exceptions to their admission.

Upon all the evidence the court found generally for the defendant, and especially that he did reach and announce a conclusion and decision that relator was not, by nativity or adoption, a member of the Wichita and affiliated bands of Indians, therefore not entitled

to an allotment, and thereupon denied relator's application for allotment, and that the defendant, as Secretary of the Interior, disapproved relator's application for membership by adoption in the Wichita Indian tribe. Relator's prayer for the issuance of the peremptory writ was denied, the rule to show cause discharged, and the petition dismissed.

At the outset it is insisted by appellant that this court on the former appeal decided that the duties of the Secretary of the Interior in this case, as shown by the petition for the writ, were purely ministerial. We do not so understand it. A demurrer having been interposed, the court held that the conceded facts were those stated in the relator's petition, and consequently it appeared that the relator had done everything required of him by the statute. Now it appears that the defendant answered, and to that answer the relator filed a plea. In the former decision this court clearly recognized that the action of the Secretary calling for the exercise of judgment could not be controlled, saying: "It was for him to determine whether the relator was within the category of persons entitled to an allotment of land, whether the land selected was of the kind which the relator was entitled to select, whether it interfered with the rights of any other persons, and all other preliminary matters going to the validity or invalidity of the relator's action."

Furthermore, in the case of United States, *ex rel.* Cox, *v.* Hitchcock, 19 App. D. C., 347, which was a similar proceeding to this, this court said: "The right of approval reserved to the Secretary by the act of Congress, and which, of course, involves the right of disapproval, is not a merely ministerial duty. Plainly it requires the exercise of judgment and discretion. It requires of the Secretary to determine whether the land selected is subject to selection, and whether all the prerequisites required by the law to be performed in order to justify his approval have in fact been performed."

This rule is in harmony with the analogous case of Riverside Oil Co. *v.* Hitchcock, 190 U. S., 316, in which the court said: "Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself."

If the Secretary of the Interior was vested with authority to decide whether the relator was entitled to an allotment under the agreement of June 4, 1891, and the statute ratifying it, then the performance of that duty was not a ministerial one, but required the exercise of judgment and discretion, and is not reviewable by the courts, even though it may seem that his determination is an erroneous one. We think there is no question but such power was vested in him. Sections 441 and 463 of the Revised Statutes give to the Secretary of the Interior management of all affairs of the Indians and of all matters arising out of their relations. The power of Congress to deal with the Indians is of the most sweeping character, and it has been recognized and affirmed by the Supreme Court from the earliest days down to the present time. Cherokee Nation *v.* Georgia, 5 Peters, 1; Choctaw Nation *v.* United States, 119 U. S., 1; Cherokee

Nation *v.* Kansas Railway Co., 135 U. S., 641; Lone Wolf *v.* Hitchcock, 187 U. S., 553. In Stevens *v.* Cherokee Nation, 174 U. S., 445, the court refused to hold that Congress could not empower the Dawes Commission to determine who were entitled to citizenship in each of the tribes and make out correct rolls of citizens.

Congress having given very general powers to the Secretary of the Interior to deal with the Indians, we think that he is empowered to provide that an adoption by an Indian tribe of a person not an Indian must be approved by the Secretary of the Interior or his subordinate, the Commissioner of Indian Affairs. This is a proper regulation and one in the interest of the Indians. But in the absence of any such regulation at a time when adoption is claimed, still the power to inquire into and decide that question is given by the agreement under which allotment is claimed by the relator.

Article 4 of that agreement provides that the allotments of land are to be approved by the Secretary of the Interior. That fairly implies that he is to determine whether the party claiming the allotment is one of the parties referred to in article 2; that is, whether he is a member of the tribe or of the affiliated bands referred to. The determination of the question is an exercise of discretion and judgment.

But it is contended by appellant that the evidence in the case "disproves the return of the secretary that he did reach and announce a conclusion and decision that the relator was not by nativity or adoption a member of the Wichita and affiliated bands of Indians, and for that reason was not entitled to an allotment under the agreement so ratified."

At the most, we can only decide whether the Secretary of the Interior did actually pass upon the question. Whether his decision was right or wrong is not for us to decide. The case was tried without a jury, and the court below made certain findings of facts, among them the following:

"(2.)The court finds that the defendant did reach, and announce a conclusion and decision that the relator was not, by nativity or adoption, a member of the Wichita and affiliated bands of Indians, and for that reason was not entitled to an allotment of land as prayed, and that thereupon the defendant did deny the application of the relator for such allotment.

"(3.) The court finds that the defendant, as Secretary of the Interior, disapproved the application of the relator for membership by adoption in the Wichita tribe or band of Indians."

It appears that in 1893 the regulations of the Indian Department were revised and provision made for the approval by the Indian Office of adoptions into Indian tribes, and that such provision has been continued and acted upon and recognized by the tribal authorities. It is insisted that some years before this express provision for approval was in force, the relator was adopted as a member of the Wichita tribe, and that no retroactive effect can be given to the provision. However this may be, we believe that it was within the power of Congress to give to the Secretary of the Interior authority to determine who were entitled to citizenship in the Wichita tribe,

and the agreement of June 4, 1891, provides for the determination of that question by the Secretary of the Interior when it provides, as it does, that the allotments of land shall be approved by him, and, as before stated, we so held when this case was here on petition and demurrer.

The power is a salutary one and in the interest of the Indians as well as of the Government. This, however, is a phase of the question that we need not enlarge upon, for we have no more to do with the wisdom of the regulation and of Congressional action than we have with the question whether the Secretary arrived at a correct decision in any given case.

That the relator was adopted on different occasions by the tribal authorities, and adoption refused on at least one occasion, we may concede, for the question is not that, but rather whether the adoption was ever approved by the Indian Office, or whether anything precluded the Interior Department from determining the question after the agreement of June 4, 1891, was approved by Congress on
51 March 2, 1895. We think that the question was an open one, and that the Secretary of the Interior was free to examine the question as to right of the relator to an allotment of land, and that it was his duty so to do. When the Secretary of the Interior was called upon in 1901 to consider the right of the relator to an allotment of land it was permissible for him to examine the records of the Department of the Interior to aid him in determining the question. These records disclosed that the question of the adoption of the relator into the Wichita tribe had been passed upon by his predecessor in February, 1898. That action approved a recommendation of the Commissioner of Indian Affairs, bearing date June 7, 1895, which showed that the council of the Wichita and affiliated tribes had refused to adopt the relator. By his decision of July 3, 1901, it appears that on May 21, 1901, the council had voted in favor of the relator's adoption. It would seem that these various and conflicting tribal actions were such as would require the Secretary of the Interior, in determining whether the relator was entitled to an allotment of land, to exercise judgment, and that it was not a mere ministerial duty that he was called upon to perform. The conclusion of the Secretary was that "the application of Willis C. West for enrolment by adoption with the Wichita tribe is denied." We think this amounted to a decision that the relator was not by nativity or adoption a member of the Wichita or affiliated band of Indians, and for that reason not entitled to an allotment of land.

To approve or disapprove any alleged adoption of the relator by the Wichitas was a right vested in the Secretary of the Interior, and without his approval the relator could not become a member of the tribe. Not being a member of the tribe by nativity or adoption, he was not entitled to any allotment of land, and the Secretary of the Interior in refusing to approve an allotment was exercising a duty calling for the exercise of judgment. It follows that the answer of the Secretary was sufficient and not open to demurrer, which was therefore properly overruled. The answer and plea raised an issue which was correctly decided by the trial court, and the objection

taken to the admission of the evidence offered on behalf of the defendant was properly overruled.

Finding no reversible error in the proceedings in the lower court, we shall affirm its judgment with costs. And it is so ordered.

52 TUESDAY, *December 5th, A. D.* 1905.

No. 1555, October Term, 1905.

UNITED STATES *ex Relatione* WILLIS C. WEST, Appellant,

vs.

ETHAN A. HITCHCOCK, Secretary of the Interior.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE DUELL.

December 5, 1905.

THURSDAY, *December 7th, A. D.* 1905.

No. 1555.

UNITED STATES *ex Relatione* WILLIS C. WEST, Appellant,

vs.

ETHAN A. HITCHCOCK, Secretary of the Interior.

On motion of Mr. S. A. Putman, of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States, issue, and the bond for costs is fixed at the sum of three hundred dollars.

53 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between United States *ex relatione* Willis C. West, Appellant, and Ethan A. Hitchcock, Secretary of the Interior, Appellee, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing

that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of January, in the year of our Lord one thousand nine hundred and six.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by
—— ——.

54 *(Bond on Writ of Error.)*

Know all men by these presents, That we, Willis C. West, as principal, and William C. Shelly and A. O. Von Herbulis, as suret-, are held and firmly bound unto Ethan A. Hitchcock in the full and just sum of Three hundred dollars to be paid to the said Ethan A. Hitchcock, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of January, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between The United States upon the relation of Willis C. West, appellant, and Ethan A. Hitchcock, Secretary of the Interior, appellee, a judgment was rendered against the said Willis C. West, and the said Willis C. West having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Ethan A. Hitchcock, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Willis C. West shall prosecute said writ of error to effect, and answer

all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIS C. WEST. [SEAL.]
WILLIAM C. SHELLY. [SEAL.]
A. O. VON HERBULIS. [SEAL.]

Sealed and delivered in the presence of—
—— ——.

O. K.
D. W. BAKER,
U. S. Att'y D. C.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1555. United States *ex Relatione* Willis C. West, Appellant, *vs.* Ethan A. Hitchcock, Secretary of the Interior. Bond for costs on Writ of Error to Supreme Court, U. S. Court of Appeals, District of Columbia. Filed Jan. 4, 1906. Henry W. Hodges, Clerk.

55 UNITED STATES OF AMERICA, *ss:*

To Ethan A. Hitchcock, Secretary of the Interior, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein United States *ex relatione* Willis C. West, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 4th day of January, in the year of our Lord one thousand nine hundred and six.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Jan. 4, 1906.

Service of Citation hereby accepted.

DANIEL W. BAKER,
U. S. Att'y for D. C.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jan. 4, 1906. Henry W. Hodges, Clerk.

56 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 55 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of United States *ex Relatione* Willis C. West, Appellant, *vs.* Ethan A. Hitchcock, Secretary of the Interior No. 1555, January Term, 1906, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 8th day of January, A. D. 1906.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,074. District of Columbia Court of Appeals. Term No. 194. The United States *ex relatione* Willis C. West, plaintiff in error, *vs.* Ethan A. Hitchcock, Secretary of the Interior. Filed January 31st, 1906. File No. 20,074.

FILE COPY.

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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 194.

THE UNITED STATES, EX RELATIONE, WILLIS C. WEST,
PLAINTIFF IN ERROR,

vs.

ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR,
DEFENDANT IN ERROR.

Brief for Plaintiff in Error.

WILLIAM H. ROBESON,
WILLIAM C. SHELLEY,
SAMUEL A. PUTMAN,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 194.

THE UNITED STATES, EX RELATIONE WILLIS C. WEST, PLAINTIFF IN ERROR,

vs.

ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

This case was commenced by a petition to the Supreme Court of the District of Columbia for a writ of mandamus to compel the Secretary of the Interior to approve the selection by the relator in said court of a certain tract of land in the Wichita Reservation in the Territory of Oklahoma. The defendant in error, the Secretary, demurred to the original petition and the demurrer was sustained. From this order the relator appealed to the Court of Appeals of the District of Columbia, where the

judgment of the Supreme Court of the District was reversed (19 Appeals D. C., 333). The Secretary then filed an answer in the Supreme Court of the District (Rec., p. 10) and the relator moved for the issuance of a peremptory writ, notwithstanding the answer, and the motion was denied (Rec., pp. 12, 13). The relator then demurred to the answer and the demurrer was overruled (Rec., pp. 12, 14). The relator then traversed the return by four separate pleas to which the Secretary in turn demurred. The court overruled the demurrer to the first plea and sustained it to the second, third and fourth (Rec., pp. 13, 16). The Secretary then joined issue upon the first plea; evidence was presented by both parties and the case submitted to the court without a jury. The court rendered a judgment, denying the writ, and from that judgment an appeal was taken to the Court of Appeals of the District of Columbia; that court having affirmed the judgment of the court below, a writ of error was sued out, bringing the cause into this Court. The material allegations of the petition are as follows:

The Petition.

On June 4, 1891, an agreement was made between the Wichita tribe of Indians and the United States, by which the said tribe ceded its lands to the United States. Out of these lands, however, there was first to be allotted to each member of the tribe, native and adopted, not to exceed 1,060, a tract of 160 acres. The relator was one of the signers of this agreement for and on behalf of the

tribe and as a member thereof. The agreement was ratified by the Act of Congress, March 2, 1895 (28 Stat. L., 876, 910). If the agreement provided that the native and adopted members of the tribe in the selection of their lands were to take tracts one-half of which should be arable and the other half grazing lands. It provided that certain areas should be set apart for public purposes; that within these areas selection might not be made except by those members of the tribe who had previously improved lands therein. It gave to every member of the tribe the undisputed right to select for his allotment the tract on which he had made improvements, no matter where it was situated. It provided that after the tract had been selected and taken and approved by the Secretary of the Interior, the United States should hold the lands in trust for the allottee for the term of 25 years, at the end of which time the allottee (or his heirs) was to be vested with an indefeasible title. The lands remaining after the allotment were to be open to settlement under the homestead laws of the United States. The number of the members of the tribe and its affiliated bands, native and adopted, entitled to allotment will not exceed, but will fall below, one thousand and sixty.

The relator is a white man, over the age of 21 years, a citizen of the United States and resident in the Wichita Reservation in Oklahoma. Long prior to 1891 he married a woman who was by blood a member of the Wichita tribe. By reason of this marriage he became an adopted member of the tribe according to its estab-

lished usages and customs, and, since his marriage, has been continuously recognized as such by both the tribe and the United States authorities. At the time of the negotiation of the agreement hereinbefore referred to, the tribe, in council assembled, formally and solemnly adopted and recognized the relator as a member of the tribe, and he then signed the agreement referred to.

Again, on May 21, 1901, in the presence of the agent of the tribe, the relator was by the tribe formally confirmed and recognized as an adopted member. Prior to that date the relator had been enrolled for and regularly paid his *per capita* share of the tribal funds, at the same time and in the same manner as his fellow tribesmen were paid, and had been enrolled on the census roll of the tribe by the United States Indian agent as a member thereof. After the making of the agreement of June 4, 1891, the relator duly selected 150 acres of land, more particularly described in the petition, being a tract upon which he had made valuable and permanent improvements, and in all other respects subject to selection by him. He made application to the Secretary of the Interior for the approval of this selection and the Secretary declined to approve it.

The reservation was opened to settlement on the 6th day of August, 1901. On the day preceding this relator filed in the Supreme Court of the District of Columbia a petition for a writ of *mandamus*, alleging, among other things, that by reason of the location and the improvements thereon the tract selected by relator would be entered by some one entitled to enter land after the pro-

vision for the opening of said land for settlement went into effect.

The Answer and Plea.

The Secretary in his answer does not deny a single fact set up in the petition. His defense is contained in the statement that at the time of the application of relator to him he had no knowledge respecting him, either as to his nativity or adoption as a member of the Wichita tribe, and has obtained no knowledge since on said subject, except such as was obtained in the course of his official examination and consideration of the application for allotment with the view to its approval or disapproval, and in order to properly discharge his duty in the premises the Secretary of the Interior examined and considered the said application and all evidence and proofs presented by or on behalf of the relator, and also such other evidence and proofs bearing thereon as were embodied in the public records and files in the Indian Bureau and in the Department of the Interior, and upon consideration of all such evidence and proof the Secretary did, on July 3, 1901, reach and announce a conclusion and decision that the relator was not by nativity or adoption a member of the Wichita and affiliated bands of Indians, and for that reason was not entitled to an allotment in the premises, and he therefore denied his application for the same (Rec., pp. 10, 11).

The plea of relator upon which the appellee joined issue was in these words:

Relator says that the defendant, as Secretary of the Interior, did not, by the decision alleged in the answer to have been made by him on July 3, 1901, decide that the relator was not by nativity or adoption a member of the Wichita or affiliated band of Indians, and for that reason denied him the said allotment (Rec., p. 14).

Both the relator and the Secretary submitted evidence in support of their several contentions, which is set out in full in the bill of exceptions (Rec., pp. 22–45).

The relator objected to the competency of all of defendant's evidence, for reasons which will hereinafter more fully appear, and excepted to the rulings of the court admitting it.

Specification of Errors.

The plaintiff in error says that the Supreme Court of the District of Columbia erred—

1. In not issuing a peremptory writ, notwithstanding the answer.

2. In overruling the relator's demurrer to the answer.

3. In sustaining the defendant's demurrer to the relator's second, third, and fourth pleas.

4. In admitting the evidence submitted by the defendant.

5. In denying the writ of mandamus.

And the plaintiff in error says that the Court of Appeals of the District of Columbia erred—

1. In not reversing the judgment of the Supreme Court

of the District of Columbia, because of the errors of that court herein above assigned.

Motion for Issuance of the Writ and the Demurrer.

The relator contends that either the motion for the peremptory issuance of the writ, notwithstanding the answer or the demurrer to the answer, should have been allowed or sustained by the trial court. These two forms of pleading seem, in most jurisdictions, to perform the same function (Silverthorn *vs.* Warren R. Co., 33 N. J. L., 173; *ex parte* Newman, 14 Wall., 152). If there is any distinction between them, it is that where the motion for the writ is granted, the respondent has no opportunity to amend and cure the defects of his return. If the demurrer is sustained this opportunity may be afforded him. Fearing that the court might hold the return to be only defective because it was not full enough, the relator deemed it wiser to demur also. The reasons for granting the motion and for sustaining the demurrer are the same and they will be considered together.

It is a well settled principle for which authority is scarcely necessary, that the allegations of the petition which are not denied, or which are insufficiently answered, must be held to be admitted by the respondent. The petition in this case alleges that the relator is an adopted member of the Wichita tribe and was a member long before Mr. Hitchcock was Secretary of the

Interior. It sets out in detail the facts upon which this allegation is based. The relator is a member of the tribe by its ancient usage and custom in admitting to membership those persons who were married to members of the tribe. The answer does not deny this usage and custom. The membership of the relator has been recognized more than once by formal action of the tribe and always by the Interior Department, until about the time of this application by him for approval of his selection of land. The petition shows that the tribe affirmed his membership at the time of signing the agreement of June 4, 1891, and that he was a signer on behalf of the tribe of that agreement. It shows also that his membership was reaffirmed by vote of the tribal council, May 21, 1901. It shows that the Department recognized him as a member by treating with him for the agreement of June 4, 1891, and by carrying him upon the rolls of the tribe and paying him his per capita share of the tribal fund at the same time and in the same manner as other members of the tribe were paid (Rec., pp. 4 5).

The answer does not deny any of these facts in detail, nor does it specifically deny the conclusions that the relator is an adopted member of the tribe. In the language of the Court of Appeals, considering the first appeal of this case (West *vs.* Hitchcock, 19 App. D. C., 333), no denial "well could be made (of the adoption), in view of the well established custom of the Indians for over two hundred and fifty years, to admit white men into membership of their several tribes by the process of adoption, and in view of the uniform recognition of this custom by

the Government of the United States." What is now contended to be the denial of the Secretary in his answer is contained in these words:

> He considered the said application of the relator and all evidence and proof presented by or in behalf of the relator in support of such application, including each and all of the matters set forth in the petition herein in support of such application, and also such other evidence and proofs bearing thereon as was embodied in the public records and files of the Indian Bureau and in the Department of the Interior, and upon full consideration of the said application of the relator and of all such evidence and proofs this defendant, as Secretary of the Interior, did on the 3d day of July, 1901, reach and announce a conclusion and decision that the relator was not by nativity or adoption a member of the Wichita and affiliated bands of Indians.

This answer must be held by the Court to be an admission that the averments of the petition as to the adoption are true.

> Creager *vs.* Hooper, 83 Md., 490; People *vs.* Ovenshine, 41 How. Pr. (N. Y.), 164; People *vs.* Crab, 156 Ill., 155.

Holding the averments of the petition then to be true, there was no disputed question of fact before the Secretary, about which he had the right to exercise discretion, or upon which he could decide that the relator was not an adopted member of the tribe.

Both the courts below seem to us to have given undue

weight in respect of this to the case of Riverside Oil Co. vs. Hitchcock (190 U. S., 316), for we submit that is a case essentially different from this. That was a case where the Commissioner of the Land Office and the Secretary of the Interior had refused to approve selections of land made by the petitioner in that case, in lieu of some lands lying within forest reservations which he had previously surrendered to the United States. In that case, several disputed questions of fact were submitted to the Department, for the solution of which the judgment and discretion of the Secretary and the Commission were necessary. It was an open question whether the lands selected were vacant at the time of the selection. It was a question whether or not they were mineral lands, and there were other questions calling for the exercise of Departmental discretion. Having these facts in view, Mr. Justice Peckham, in his opinion, says:

> "Upon a perusal of the record it appears that those questions are not merely formal ones, nor are they so plain as not to require the careful judgment of any tribunal to which they may be referred for decision. Their solution was properly submitted to the Land Department, which had full and complete jurisdiction over the matters arising under the act of June 4, 1897, and it thereby became the duty of the officers of that Department to decide them. * * * Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial function, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands.

> "Neither an injunction nor *mandamus* will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion."

In the case at bar we submit that the allegations of the petition which are not denied by the answer, show that the adoption of the relator into the tribe was complete and his membership fully vested long before his application to the Secretary for approval of his selection for allotment was made, and this being true, no room was left for the exercise of discretion or judgment by officers of the Department in respect of relator's membership in the Wichita tribe. We concede that the case cited would be applicable if the answer had denied the identity of the relator or had denied the facts set up as determining his membership in the tribe, but the Secretary, having conceded these facts by his answer, it was his plain ministerial duty to approve the selection by relator, as by other members of the tribe, native and adopted. Any other course was purely arbitrary conduct. If this contention is correct, the Secretary has failed in the performance of a mandatory duty imposed upon him by the statute, and the writ should have issued without further proof on the part of the relator.

Argument on the Evidence.

The only evidence offered by the relator after the denial of the motion for the issuance of the writ and after the demurrer was overruled, was a copy of the

decision of the Secretary of July 3, 1901 (Rec., pp. 23–24), which fully sustains the allegations of relator's petition and equally disproves the return of the Secretary that he did "reach and announce a conclusion and decision that the relator was not by nativity or adoption a member of the Wichita and affiliated bands of Indians, and for that reason was not entitled to an allotment under the agreement so ratified."

We commend this decision to the Court as a shining example of Departmental jurisprudence. It recites that relator is married to a Wichita woman and that his membership in the tribe has been formally recognized by vote of the tribe in council. It recites relator's residence with the Indians since 1882 and marriage into the tribe in 1891, and almost in the same breath says that he does not live with the tribe. It denies his application because he does not show any consideration or services rendered to the tribe such as should entitle him to receive benefits with it, an averment that probably could be made with equal force in passing upon the application of many native members of the tribe who have been a burden rather than a benefit to the tribal body. Another reason given for the refusal is that the relator "seems well-to-do." Consolation, however, is given him by the promise that his wife and children will receive allotments. Although it is outside the record, we cannot refrain from saying, upon the absolute knowledge of one of our number, that the relator and his wife have never been blessed with any children. Whether or not the promise has been fulfilled as to the

wife the record does not show, but it does show that neither the husband or wife has received the land here in question to which as their homestead they had the "undisputed right" under the terms of the agreement and statute. This is the decision to which the Secretary refers in his answer, when he gravely informs us that he did "reach and announce a conclusion and decision that the relator was not by nativity or adoption a member of the Wichita and affiliated bands of Indians." We respectfully submit that in so far as this decision goes to the question of relator's membership in the tribe, it concedes it.

The application pending before the Secretary did not ask him to decide whether relator had ever been adopted into the tribe by usage and custom, or by formal tribal action. The only question that was before him was whether or not the selection for allotment made by the relator conformed with the provisions of the agreement and statute, and the only question which he decided, or could decide, was that he would not approve relator's selection, and he decided this, although he admitted in the same decision that the relator was a member of the Wichita tribe.

The evidence submitted for the Secretary consisted entirely of records and correspondence taken from the files of the Interior Department. They confirm in almost every particular, and in no case do they disprove the allegations of the petition.

We objected and excepted to the ruling of the court in admitting these records because they did not support

any averment or denial of the Secretary's answer, and we now insist that their consideration by the court was error. In so far as they are confined to the matters referrrd to in the petition and the answer, they entirely support the allegations of the petition. They show that the relator had married a Wichita woman and was one of the signers of the agreement of June 4, 1891, on behalf of the tribe, and was at that time recognized by the tribe and by the officers of the United States as a member. They show that his name was duly entered upon the grass payment rolls of the tribe and that he received from time to time his per capita share of grass moneys paid the Wichita tribe; that his name continued to appear upon said tribal roll until February 10, 1898, when it was stricken off, not by order of the Secretary, but by the Kiowa Indian Agent (Rec., p. 32). In addition, they show why this ill-considered and unauthorized action of the agent was taken.

It appears (Rec., p. 28) that some time prior to February 19, 1894, certain persons, not members of the tribe, applied to it for adoption as members and the tribe had expressed its desire for their admission. It does not affirmatively appear that the relator was one of these, but subsequent proceedings, hereafter to be referred to, indicate that without his knowledge his name was included in the number. The Department, not believing that it had the power to approve or disapprove an adoption, or being unwilling to exert it, resorted to other means and instructed the agent that there was "nothing to show that the council was a proper one; that it had

any authority to act; that it represented the tribes, or that its action expressed the wishes of the majority"; and directed the agent to call another council and especially call to the attention of and make clear to that council the fact that "for every allotment taken in excess of 1,060 a reduction will be made from the purchase price paid them for each allotment taken in excess at the rate per acre allowed for their surplus" (Rec., p. 29), and this was to be explained to the Indians, although, so far as this record shows, there was no likelihood of the number of allotments exceeding, or even reaching, 1,060. The council thus called by the agent met on February 21, 1895 (Rec., p. 30), and was attended by a membership of only 35 out of the whole number of the tribe, and the name of the relator was rejected—13 ayes and 17 nays. The relator was already a member of the tribe; his membership had never been questioned by the United States or by the tribal authorities, and his name was presented to the tribe for adoption without his knowledge or consent, and, as he claimed at the time, had no bearing on his rights (Rec., p. 35). He thereupon moved the tribe to rectify the injustice done him, and on March 23, 1897 this was done by a vote of 92 in his favor and 24 opposed (Rec., p. 36). On June 5, 1897, the agent recommended to the Department the disapproval of the adoptions of this council, and on February 7, 1898, the Department disapproved them all and directed the agent to "inform all the parties interested of this action in the premises." Although it does not appear that relator was individually referred to by this direction, the agent seems to have

construed it as authority to strike his name from the grass payment rolls and acted accordingly (Rec., p. 32). That these proceedings were the natural mistakes of an unlettered people and had no bearing upon the right of the relator, is evident to us, and we would not refer to them now, but for the impression they seem to have made upon the Court of Appeals, for it says:

> "It would seem that these various conflicting tribal actions were such as would require the Secretary of the Interior, in determining whether the relator was entitled to an allotment of land, to exercise judgment, and that it was not a mere ministerial duty which he was called upon to perform."

We shall contend that with this action of the tribe, mistaken or otherwise, the Secretary had no other concern than to recognize it as determining the status of the relator in the tribe. Whether the tribe acted under a mistaken apprehension of the facts or not, in the first council, the result of the second council certainly determined that relator was a member of the tribe, and this was reaffirmed May 21, 1901, as shown by the Secretary's decision of July 3, 1901. The entire evidence in the case shows that the membership of the relator in this tribe as early as this record begins, was recognized by the tribe and by the United States in every transaction until he was by mistake stricken from the grass payment roll, in February, 1898, by the agent at the Kiowa agency. With tastes evidently more suited to Indian tribal life than to the habits and customs of his own people, he had gone among these Indians as early as 1882. He had

married one of their women, acquired membership in the tribe and made his home with them. Undisturbed in his tribal membership by anyone in authority, he had long before selected the land here in question and made many valuable improvements on it to fit it for a home for himself and his wife, where they might pass the remainder of their days. Secure in the knowledge of his vested rights, he had co-operated on behalf of his fellow tribesmen, with the officers of the United States in the negotiation of an agreement which had added a very large area to the public domain; had secured to himself and his fellow tribesmen the right to individual ownership in their homes, and had in every way rendered more satisfactory the relations between his tribe and the Government. So long as his services in negotiating the agreement were necessary and his influence with the other Indians was desirable, his title to tribal membership was clear enough and strong enough to satisfy the most jealous guardian of tribal rights to be found in the Indian Office. Only when the need for him was past and when he demanded his part of the consideration for the grant of these lands was it discovered by the Interior Department that it was the function of the Secretary and not of the tribe in council to determine who was and who was not of its membership. And this function, although so earnestly claimed in behalf of the Secretary now, had been so rarely exercised prior to the time when the relator was stricken from the grass payment rolls that although the Secretary, over our objection and exception, submitted several papers showing that at times the Department

had exercised this function, it could only be shown to have been exercised once prior to September 8, 1900. And the regulations of the Department contained no provision for approval of adoption by the Secretary until December 28, 1893.

Jurisdiction of the Secretary in the Matter of Adoption.

We know of no authority for this interference by the Secretary with the internal affairs of an Indian tribe. The duties of the Secretary and the Commissioner are defined by Sections 441 and 463, Revised Statutes.

> SEC. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:
>
> * * * * * * *
>
> THIRD—THE INDIANS.
>
> * * * * * * *
>
> SEC. 463. The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations.

We contend that by the terms of these statutes the management and supervision contemplated to be exercised by the Secretary and the Commissioner is limited to matters pertaining to the "relations" of the tribe to the United States, and that its extension to matters pertaining solely to the internal affairs of the tribe, is not only without authority of law, but is a gross violation

of the Government's duty to the tribe and its members, and this contention has been fully sustained by the courts.

The failure to observe this distinction, we think, has resulted in errors in both the courts below. The trial court made two special findings of fact which, in their last analysis, were really conclusions of law. One was that the Secretary made a decision that the relator was not by nativity or adoption a member of the tribe; and the other, that the Secretary had disapproved the application of relator for membership.

As we have already shown, these findings are contrary to the evidence in the case, and were manifestly based by the court below on his conviction that the relator could not become or remain a member of the tribe without the consent of the Secretary. This we insist is error for which the decision should be reversed, although it seems to have had weight with the Court of Appeals on the second appeal.

Mr. Justice Duell, in his opinion, says:

> "If the Secretary of the Interior was vested with authority to decide whether the relator was entitled to an allotment under the agreement of June 4, 1891, and the statute ratifying it, then the performance of that duty was not a ministerial one, but required the exercise of judgment and discretion, and is not reviewable by the Court, even though it may seem that his determination is an erroneous one. We think there is no question but that such power was vested in him. Secs. 441 and 463 of the Revised Statutes give to the Secretary of the Interior

> management of all affairs of the Indians and of all matters arising out of their relations. The power of Congress to deal with the Indians is of the most sweeping character, and it has been recognized and affirmed by the Supreme Court from the earliest days down to the present time."

We respectfully submit that this is beside the question. This Court has long since settled that the power of Congress in dealing with the Indians is subject to practically no limitation, but the powers of the Secretary under Sections 441 and 463 have not been so sweepingly defined, and this Court has never held that the Secretary has this power under these sections. In every case where an executive officer of the Government has been held to have the power to determine who were entitled to membership in tribes, the power has been derived from an act of Congress specifically creating it, and this is shown by the cases cited by the learned Justice in the courts below. But aside from this, we submit that the question presented in both the courts below was not whether the Secretary had jurisdiction to approve or disapprove of an original application for membership in a tribe. The relator was a member of the Wichita tribe of Indians and had vested political and property rights therein long before this agreement was ratified and long before July 3, 1901, when it is claimed that the Secretary decided that he was not a member. Whatever power under Sections 441 and 463 the Secretary may have with respect of the approval of adoptions, no court has ever decided, nor has any executive officer claimed

that he has power to expel from the tribe a person whose membership has become fully vested.

Our contention here is, and was in the court below, that when Congress enacted the agreement of June 4, 1891, into law, and provided for 1,060 allotments, 1,060 was the total tribal membership, native and adopted, including this relator. This relator being then a member of the tribe, his allotment was there expressly provided for and his right to an allotment as an adopted Indian became individually vested, so that surely the Secretary could not divest it under any general power which has ever been given him, and it may be well doubted if this Court would uphold even Congress in legislation directed to that purpose.

In so far as it is consistent with the power of supervision necessarily vested in the political branches of the Government, this Court has always held that the various Indian tribes within their own territory retain the right to regulate and control their internal affairs.

> "From the organization of the Government to the present time, the various Indian tribes of the United States have been treated as free and independent within their respective territories, governed by their tribal laws and customs, in all matters pertaining to their internal affairs, such as contracts and the manner of their enforcement, marriage, descent, and the punishment for crime committed against each other."
>
> Sah Quah, 31 Fed. Rep., 329.

"They (Indian tribes) were, and always have been,

regarded as having a semi-independent position, where they preserved their tribal relations, not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, within the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the States within whose limits they reside"

U. S. *vs.* Kagama, 118 U. S., 375.

"An Indian tribe within the State, recognized as such by the United States Government, is to be considered as a separate community or people, capable of managing its own affairs, including the domestic relations, and those persons belonging to the tribe who are recognized by the customs and laws as married persons, must be so treated by the courts, and the children of such marriage can not be regarded as illegitimate."

Earl *vs.* Godley, 44 N. W. Rep., 254.

"By the agreement confirmed in this act (March 2, 1889), these nations gave up a large amount of territory, and the rights conferred upon the nation or upon individuals were the consideration thereof. The persons entitled to such rights are the persons who at the time of the agreement constituted the Sioux Nation, and were lawful members thereof. The question, therefore, whether any particular person is or is not an Indian within the meaning of this agreement, is to be determined, in my opinion, not by the common law, but by the laws and usages of the tribes."

20 Opinions Att'y Gen'l, 711.

In the case of Sloan *vs.* U. S. (85 Fed. Rep., 197), where the question presented was whether Indians of mixed blood were to be considered as "Indians" in allotting lands to the members of the Omaha tribe under provisions requiring such allotments to be made to "Indians" of that tribe, Judge Shiras said:

> "It confers the right to an allotment upon the Indians of the Omaha tribe. It makes no discrimination with relation to mixed bloods. It must have been well known to Congress, as it unquestionably was to the Omaha tribe, that they were residing at that time upon this reservation, as members of the tribe, many persons of mixed blood; and if it was the purpose of the parties to exclude from the benefit of the act all persons who were not Indians of the pure blood, apt words to that end would have been used."

In the case at bar, the treaty provision is very much broader in its description of the parties entitled to allotment, being for "members of the tribe, native and adopted." (Art. II.)

It was "unquestionably known" to the Wichita and affiliated bands of Indians at the time the treaty or agreement was signed, June 4, 1891, that the relator was "residing at that time upon this reservation as a member of that tribe," for, as before stated, he was so recognized by the Indians themselves, in the presence of the commission negotiating the treaty or agreement, and, as a member of said tribe, signed the treaty or agreement in the presence of the Indians and of the Commission.

Had it not been the purpose of the contracting parties (the Indians and the United States), to recognize relator's right of membership "apt words" to exclude him from the benefits of such membership "would have been used." Instead of which we find that by the provisions of Article V he must have been counted and included as a beneficiary of the agreement.

In the case of Jones *vs.* Mehan (175 U. S., 1) the treaty between the Chippewa Indians and the United States contained a provision setting apart a reservation of 640 acres to Moose Dung, chief of the tribe, who entered into possession of the same. Some years afterwards, dying, his son, also named Moose Dung, entered into possession as his only heir, being the oldest son of his father by his first marriage, and entered into some leases with certain white persons, which, subsequently, becoming a matter of contest, involved the rights of others claiming as heirs; and a sum of money being in the hands of the Indian Department as rental of a part of said lands, the Commissioner of Indian Affairs directed the Indian agent for the Chippewa tribe to "fully investigate the subject as to who are the legal heirs of old chief Moose Dung, for the purpose of ascertaining to whom rent should be paid." The agent made such investigation, and reported that certain six descendants of old chief Moose Dung were his only living heirs, and entitled to share equally in his estate. The Commissioner forwarded this report to the Secretary of the Interior, recommending that these six persons be determined to be the heirs of old chief Moose Dung, and the Secretary of the Interior,

concurring in the recommendation, returned the papers, whereupon the Commissioner directed the Indian agent to distribute the proceeds of the lease in his hands in accordance with that decision. The court said:

> "The Department of the Interior appears to have assumed that, upon the death of Moose Dung, the elder, in 1872, the title in his lands descended by law to his heirs generally, and not to his eldest son only. But the elder chief Moose Dung, being the member of an Indian tribe, whose tribal organization was still recognized by the Government of the United States, the right of inheritance in his land, at the time of his death, was controlled by the laws, usages, and customs of the tribe, and not by the law of the State of Minnesota, nor by any action of the Secretary of the Interior."
>
> "An Indian tribe is a separate organization, with their own laws and customs." See also
>
> Stephens *vs.* Cherokee Nation, 174 U. S., 445.

Some time previous to 1830, Smith, who was a white man, intermarried with Eliza, who was an Indian woman of the Choctaw Nation. After marriage they continued to reside in the same Nation on the lands described in the bill, guaranteed by the 19th article of the treaty of Dancing Rabbitt Creek, concluded in 1830, which provides that each head of a family who cultivated 30 acres of land during the year 1830 should have three quarter sections of land, including improvements, etc. Smith located the lands in the names of himself and wife, and in 1835 sold the same to Hall, from whom the appellee derives title. The court said:

"It is unquestionably true that the treaty has reference to the head of a family living under the dominion of the Choctaw Nation; but the treaty does not say that a white man may not, according to the usages and customs of that Nation, be the head of a family. When a white man marries a woman who was a member of the Indian Nation, and adopted her domicile, whether he became the head of a family or not depended upon the law or custom regulating the rights of the parties in such case. And this is what we presume the treaty means when it speaks of the head of a family; one who is so in the Choctaw sense of the term, according to the usages and customs of that Nation."

Turner *vs.* Fish, 28 Miss., 306.

In Senter *vs.* Choctaw Nation (MSS.), decided by Judge Clayton, of the Indian Territory, the question being as to the effect of a marriage between a white man and a Choctaw Indian woman, it is said:

"The Court is of the opinion, therefore, that in order to confer the right of citizenship by marriage in the Choctaw Nation, the marriage must be a valid one under the provisions of the Choctaw laws."

And in the case of Tucker *vs.* Choctaw Nation (MSS.), a case where a white man married a Choctaw Indian woman under a license from the Clerk of the United States Court, and afterwards learning that said marriage did not confer upon him the right to become a citizen of the Choctaw Nation, he remarried the same woman in accordance with the provisions of their laws, the Court said:

"It simply had the effect of naturalizing the party. It gave the Choctaw Nation the opportunity of inquiring into his character, which was proven good. He paid the license fees and took the oath, and fully complied with the Choctaw laws, and hence was entitled to membership in that tribe."

The last-named Choctaw cases, it will be borne in mind, were decided under the written statutes of the Choctaw Nation, their laws providing expressly for intermarriage with citizens of the United States. The Wichita Indians, it is contended, have their laws also upon the same subject, which are entitled to as much consideration by the courts, when proved. It is true such laws are unwritten, and consist in the usages and customs of the tribe from time immemorial, but they are the laws of the tribe nevertheless, and are as binding as if written, and require only to be averred and proved as other facts. (Turner *vs.* Fish, Miss., 306.)

"The indictment charged that Rutherford was a 'white man and not an Indian,' but testimony was offered for the purpose of showing that, although a white man, he had been adopted into the Cherokee Nation, which, if proved, would oust the Federal Court of jurisdiction within the rule laid down in Alberty *vs.* U. S., (162 U. S. 499). In that case it was held that the courts of the Nation have jurisdiction over the offenses committed by one Indian upon the person of another, and this includes, by virtue of the statutes, both Indians by birth and by adoption. * * * Again, it is evident that Rutherford intended to change his nationality and

become a Cherokee citizen. He took the steps which the statutes prescribed, and did, as he supposed, all that was requisite therefor. He was marrying a Cherokee woman, and thus, to a certain extent allying himself with the Cherokee Nation. * * * It appears, therefore, that Rutherford sought to become a citizen, took all the steps he supposed necessary therefor, considered himself a citizen, and that the Cherokee Nation in his lifetime recognized him as a citizen, and still asserts his citizenship. Under these circumstances, we think, it must be adjudged that he was a citizen by adoption."

Nofire *vs.* 164 U. S., 657, 658, 661, 662.

See, also,

U. S. *vs.* Rogers, 4 How., 567.
Roff *vs.* Birney, 168 U. S., 218.
O'Brien *vs.* Bugbee, 26 Pac. Rep., 428.
Seneca Nation *vs.* Lemley, 8 N. Y. S., 245, 55 Hun., 83.

Departmental Construction.

The Commissioner of Indian Affairs, in his annual report of August 27, 1892, discusses very elaborately the question, "What is an Indian?"

In that discussion, referring to the matter of adoptions, he says:

"In the early history of America many white men were adopted into Indian tribes, and in accordance with the customs of those tribes become recognized as members and entitled to all the rights therein that the members of the Indian blood were entitled to enjoy. After the relations between this Govern-

ment and the Indian tribes assumed the form which has been likened to that of guardian and ward, provision was made in many of the Indian treaties for the regulation of such adoption of whites into Indian tribes, as well as for the regulation and adoption therein of Indians of different tribes, nations, or bands; and in many cases the United States has been given the right to supervise and approve or disapprove such adoption thereafter made, as the best interests of the Indian tribes would seem to demand."

Rep. Com. Indian Aff'rs, 1892, p. 33.

From this it would appear that the executive officers of the United States Government have no inherent right to sit in judgment upon the question of tribal membership, but that the tribe itself is supreme as to that question, as it is admitted to have been in the early history of America, and that such right of supervision as may now be claimed to exist, must exist alone by virtue of some law of Congress as to that particular tribe, or some treaty between that tribe and the United States conferring such authority. In the absence of such express delegation of authority, the tribe remains sovereign, as has been shown.

Stevens *vs.* Cherokee Nation, 174 U. S., 445.

The Commissioner, in the same report, further says (p. 36):

"Also where Congress has required a census to be taken of an Indian tribe (as in the case of the Chippewas, 25 Stats., 642) the roll of names submitted

> of those recognized by the Indians as members of their tribe, including half-breeds and mixed bloods, has been excepted by the Executive Departments of the Government without question as conforming to the requirements of the Statute."

In the same report the Commissioner further says (p. 37):

> "It is also worthy of consideration in this connection that the United States Government has been, and is the trustee of vast sums of Indian money, and that it has from time to time disbursed this money by paying it *per capita* to the Indians, recognizing as Indians all who are borne upon the rolls, and recognized by the Indians themselves as members of their tribes, including half-breeds and mixed bloods."

In the light of this report of August 27, 1892, and the regulations of the Indian Department (Rec., pp. 25, 26), which first provided for Departmental approval of adoptions December 28, 1893, the necessity for this approval would seem to be a new doctrine antagonistic to the decisions of the Supreme Court and discovered since the agreement of June 4, 1891, was negotiated and since the rights of relator were acquired.

Vested Rights Involved.

And we insist that the Court should not lose sight of the fact that we are dealing with the vested property rights of individuals. Before the United States had any claim to these lands, this relator owned an interest therein as an adopted member of the tribe. The agree-

ment itself declares that to those individuals who occupy the status of this relator "there shall be allotted 160 acres of land"; and, again, that "each and every member of the tribe shall have the right to select" their lands; and, finally, that if they do not select within the time prescribed, "the allotting agent in charge of the work" shall make selections for them. In other words, the whole agreement demands that every member of the tribe have an allotment.

The vested rights of individuals are in many cases to be found in the books, the subject of most serious consideration by the courts; and their preservation has been in many instances of the allowance of the writ, one of the controlling influences.

The resulting proposition is that where rights are clearly vested, and the purpose to preserve them clearly indicated, no nicely delicate regard for what an executive claims as his prerogative shall operate to destroy, imperil, or incumber the individual rights. If the Secretary's alleged power (which is not a power but a duty) were half so clearly defined as the individual rights of this relator, there might be some reason for deference to the executive; but where the rights of the appellant are determined beyond possible question, as they are in this case, and the act of the executive in denying these rights defeats the law in letter and in spirit, shall not the presumption be against such power in the executive? Shall not any doubt be resolved in favor of the right which the law establishes and for the enjoyment of which it provides?

Stevens *vs.* Cherokee Nation, 174 U. S., 641.

Conclusion.

We therefore insist—

First. That the duty of the Secretary to identify the individual as a member of the tribe does not involve judicial discretion, but we say it is not material to determine whether this was a ministerial or a judicial duty, because the answer of the Secretary and all the evidence in the case shows that he did find that this relator is a member of the tribe and his only reason for refusing to approve relator's selection of land was because he did not approve of that membership.

Second. That membership by adoption being conceded, the approval or disapproval by the Secretary of the selection is not a power but a duty; that the duty to approve selections made within the requirements of the statute is positive, that the duty of disapproving selections applies only to those made in violation of the requirements of the statute, and that the performance of the one duty or the other is positively defined by the provisions of the act giving to the Secretary no option whatever whether he shall approve or disapprove a selection.

Third. That the allotment of land selected does not constitute a bounty from the Government, but is a partial payment of the consideration for the cession of the lands of the tribe, and that the failure of the Secretary to approve this relator's selection is a forcible abatement by that much of the consideration agreed to be paid by the United States.

With the determination of these questions in favor of the proposed allottee, then, if there ever was any ju-

dicial discretion or power vested in the Secretary, it was exhausted, and nothing remained to him but the performance of the plain duty to approve the relator's selection. Were it otherwise, the Secretary could capriciously disapprove selections; and to use the language of the Court in Marbury *vs.* Madison (1 Cranch., 137), "sport away the rights of the petitioner." If he were permitted to do this in one instance he might do it in all, until he had refused to approve as to the entire membership of the tribe, and in that way invalidate the act of Congress.

But when these facts, which the Secretary now admits, are determined in relator's favor, and the Secretary's judicial functions thereby exhausted, the same obligation rests upon him to perform the ministerial duty following upon the exercise of his judgment, as was enforced by the judgment of the Court in the case of U. S. *vs.* Schurz (102 U. S., 378), where, after once passing upon the right of the claimant to a patent, the Secretary was required to deliver it.

If in this case the courts have not power to enforce the plain mandates of this agreement and statute, it will present a condition which has often been said to involve a monstrous absurdity in organized government; that there should be no remedy, though a clear undeniable right is shown to exist.

Kendall *vs.* U. S., 12 Pet., 62.

WILLIAM H. ROBESON,
WILLIAM C. SHELLEY,
SAMUEL A. PUTMAN,
Attorneys for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1906.—No. 194.

THE UNITED STATES, Ex-Relatione WILLIS C. WEST, Plaintiff in Error,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior, Defendant in Error.

Affidavit of Walter S. Field, Showing Value of Land in Controversy in this Suit.

DISTRICT OF COLUMBIA, *ss*:

Before me, M. S. W. Day, a notary public in and for said District, personally appeared Walter S. Field, who, being duly sworn by me on oath, deposes and says:

I reside at Oklahoma City, in the Territory of Oklahoma, and am now and have been for many years familiar with the values of real estate in the Territory generally and especially in the Wichita reservation. I am well acquainted with the 160 acres claimed by the relator, Willis C. West, in this suit, and know its value. The real estate unimproved is worth not less than $5,000. The improvements which are on it now are, so far as I know, the same as those which were there at the time West selected the land and applied to have it allotted to him. These improvements were made by West himself during his occupancy of the property and were worth, at the time he left the property, not less than $2,000, and are, in my judgment, now worth about the same sum.

WALTER S. FIELD.

Sworn to and subscribed before me this third day of December, 1906.

[SEAL.]

M. S. W. DAY,
Notary Public.

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No. 194.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

UNITED STATES EX RELATIONE WILLIS C. WEST,
plaintiff in error,

v.

ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR,
defendant in error.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

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Assistant United States Attorney.

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No. 194.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

STATEMENT.

August 5, 1901, the relator (plaintiff in error here), claiming to be an adopted member of the Wichita Indian tribe, filed his petition in the Supreme Court of the District of Columbia, praying the issuance of the writ of mandamus to compel Ethan A. Hitchcock (defendant in error here), as Secretary of the Interior, to approve the relator's selection and application for allotment of a certain tract of 160 acres out of the lands (formerly embraced in Indian Territory,

now part of Oklahoma) ceded to the United States by the Wichita and affiliated bands of Indians under the agreement of June 4, 1891 (see Appendix), ratified by the act of Congress of March 2, 1895 (28 Stat., 876, 895–897); and rule to show cause followed. (Record, p. 4, et seq.)

In response, a demurrer to the petition was interposed (record, p. 2), which, by an order entered August 27, 1901, was sustained, the rule to show cause was discharged, and the petition dismissed. Upon appeal, however, that order was reversed (19 App. D. C., 333), and the cause remanded "for further proceedings therein according to law."

Thereupon the defendant below filed his answer to the petition (record, pp. 10–11), wherein, among other things, after reciting the duty laid upon him, as Secretary of the Interior, in the premises, he averred that, being without knowledge of relator's status at the time of his application for allotment, defendant, as such Secretary, examined and considered relator's application and all the evidence and proofs presented by him to support it, including all the matters now set forth in the petition, together with such other evidence and proofs bearing thereon as were embodied in the public records and files of the Indian Bureau and Department of the Interior, and that upon full consideration thereof the defendant, as Secretary of the Interior, did, on the 3d day of July, 1901, reach and announce a conclusion and decision that relator was not, by nativity or adoption, a member of the Wichita and affiliated bands of

Indians, and for that reason was not entitled to an allotment, and thereupon denied relator's application.

The answer considered, relator filed motion for the issuance of the peremptory writ, and later a demurrer, which were successively overruled. (Record, pp. 12–14.)

Relator thereafter filed his several pleas (four in number), to which defendant demurred, the demurrer being overruled as to the first plea and sustained as to the others; and on the first plea, as follows, issue was joined. (Record, pp. 14–16.)

> The relator says that the defendant, as Secretary of the Interior, did not, by the decision alleged in the answer to have been made by him on July 3, 1901, decide that the relator was not by nativity or adoption a member of the Wichita or affiliated band of Indians, and for that reason deny him the said allotment.

Upon this issue the cause was tried to the court, to maintain which issue, on his part, relator offered in evidence a duly certified copy of the Secretary's said decision of July 3, 1901, and defendant, on his part, offered in evidence official exemplifications of the correspondence, decisions, regulations, etc., referred to in his answer and set out in the bill of exceptions here presented, as well as of the decision of July 3, 1901. To all save the last mentioned of defendant's evidence relator objected, and saved his exceptions to its admission, as set out. (Record, p. 22 et seq.)

Upon all the evidence the court found that the defendant Secretary did reach and announce a conclu-

sion and decision that relator was not, by nativity or adoption, a member of the Wichita and affiliated bands of Indians, therefore not entitled to an allotment, and thereupon denied relator's application for allotment, and that the defendant, as Secretary of the Interior, disapproved relator's application for membership by adoption in the Wichita Indian tribe, and held that the evidence was insufficient in law to support a finding for the relator. Wherefore, relator's prayer for the issuance of the peremptory writ was denied, the rule to show cause discharged, and the petition dismissed. (Record, p. 16.) This judgment was affirmed by the Court of Appeals (26 App. D. C. 290; see record, pp. 46–51), whereupon the relator sued out the pending writ of error.

The trial court delivered a written opinion (Record, p. 17 et seq.), in which it was ruled as matter of law:

> (1) That before any person can be entitled to an allotment of land under the act of Congress approved March 2, 1895, ratifying the agreement of June 4, 1891, as an adopted member of the Wichita or any affiliated band of Indians, such person must show that his adoption as such member has been approved by the Secretary of the Interior.
>
> (2) The court further finds, as matter of law, that it was the duty of the Secretary of the Interior, in passing upon the application of the relator for an allotment of land, to determine whether or not said relator was within the category of persons entitled to such allot-

ment and that the decision of the defendant in that regard can not be reviewed by this court in this proceeding.

These conclusions were reached by the court after opposing counsel had been heard in oral argument as to the power and authority of the Secretary of the Interior to control the action of the Wichita tribe of Indians with respect to adoption of the relator and to determine the latter's status.

ARGUMENT.

Whilst counsel for the relator, at page 6 of their brief here, assign several matters as error, the argument with respect thereto is devoted principally to the two propositions presented by the record, as follows:

That the demurrer to the answer should have been sustained; and

That the evidence offered on behalf of the defendant, the Secretary of the Interior, was inadmissible.

THE ANSWER AND DEMURRER.

The allegations in defendant's answer to the petition, that he had, on July 3, 1901, reached and announced a conclusion and decision that relator was not, by nativity or adoption, a member of the Wichita and affiliated bands of Indians and therefore not entitled to an allotment, are sufficient to defeat the application for the writ.

The action of the defendant, as Secretary of the Interior, in refusing to approve the relator's application for an allotment of land, involved a determination by the Secretary of the question whether the

relator was within the category of persons entitled to allotment. The Secretary having alleged in his answer that he had decided that relator was not within this category, the writ of mandamus will not issue.

The relator undertook to raise this question in the trial court, first, by a motion for the issuance of a peremptory writ of mandamus, and then by a demurrer to the answer.

The motion for the peremptory writ upon the filing of the answer was the mode adopted for the purpose of contesting the validity of an answer to the alternative writ in the old days when a demurrer could not be filed to an answer in mandamus proceedings. However, this motion has no place in the present practice; and as no exception was taken to the action of the court in overruling it, it may be dismissed without consideration. This leaves for discussion the question raised by the demurrer to the answer.

Article II of the agreement of June 4, 1891, relied upon by relator, provides that—

> there shall be allotted to each and every member of said Wichita and affiliated bands of Indians in the Indian Territory, native and adopted, 160 acres of land—

and then prescribes certain restrictions with respect to the land to be selected—for instance, that half of it should be grazing lands and that no land should be selected which had been or should be set apart for certain specified purposes.

Article IV of the agreement provides:

> When said allotments of land shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior, the title thereof shall be held in trust for the allottees, respectively, for a period of twenty-five years. * * *

The relator is careful to aver in his petition that he is a legally adopted member of the Wichita tribe, and he alleges at length many things upon which he relies to sustain his assertion. He is also careful to allege that his selection of land is within all the provisions and requirements of the agreement and the act of Congress ratifying it.

When this case was first before the Court of Appeals, upon the demurrer to the petition, that court said, through Mr. Justice Morris (*supra*, p. 345):

> It is not sought to control the judgment of the Secretary in any matter calling for the exercise of judgment. It was for him to determine whether the relator was within the category of persons entitled to an allotment of land, whether the land selected was of the kind which the relator was entitled to select, whether it interfered with the rights of any other persons, and all other preliminary matters going to the validity or invalidity of the relator's action. But it is admitted by the pleadings that all this was done, and that no question whatever in that regard remains to be determined; and the legal interpretation of the action of the Department is that, although

> the relator has been adjudged to be entitled to receive his allotment, approval is arbitrarily withheld, and no cause whatever is assigned for the refusal.

Said that court, through the same justice, in deciding the similar case of *United States ex rel. Cox* v. *Hitchcock* (19 App., D C., 347, 352):

> The right of approval reserved to the Secretary by the act of Congress, and which, of course, involves the right of disapproval, is not a mere ministerial duty. Plainly it requires the exercise of judgment and discretion. It requires of the Secretary to determine whether the land selected is subject to selection, and whether all the prerequisites required by the law to be performed in order to justify his approval have in fact been performed. In the West case it appeared definitely and positively that these prerequisites had been performed, that the matter was no longer one of consideration by the Secretary, and that all that remained to be done was a mere ministerial thing.

When this case was remanded to the trial court, and the demurrer there overruled, the defendant filed an answer in which he set forth that he had examined and considered the application of the relator for approval of his selection of land, and all evidence and proof presented in support thereof, including all the matters set forth in the petition, and also such other evidence bearing thereon as was embodied in the pub-

lic records and files of the Indian Bureau and the Department, and upon full consideration thereof—

> did, on the 3d day of July, 1901, reach and announce a conclusion and decision that the relator was not, by nativity or adoption, a member of the Wichita and affiliated bands of Indians, and for that reason was not entitled to an allotment under the agreement so ratified, and thereupon this defendant, as Secretary of the Interior, denied the application of the relator for said allotment.

Counsel for relator argue that this answer is insufficient in that it does not deny the averments of the petition that the relator is in all respects an adopted member of the Wichita tribe of Indians.

This contention is without foundation, however, for, as it is shown, the answer avers an adjudication by the defendant, as Secretary of the Interior, upon certain evidence therein referred to, whereby the relator's alleged status of a legally adopted member of the Wichita tribe is clearly denied and his claimed title to an allotment is effectually negatived.

The Court of Appeals had already said in the case, too, that it was for the Secretary to determine whether the relator was such an adopted member; and of course it is elementary law that when in such a case the Secretary has determined that or any question so committed to him it is immaterial whether his determination is right or wrong; that is a matter which can not be considered by the

courts, and his decision can not be reviewed by them.

In the case of *De Cambra* v. *Rogers* (189 U. S., 119, 122) it is said:

> It is hardly necessary to say that when a decision has been made by the Secretary of the Interior courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination.

In *Riverside Oil Co.* v. *Hitchcock* (190 U. S., 316, 325) this court said:

> Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility as well as the power rests with the Secretary, uncontrolled by the courts.

The decision of the Court of Appeals in this case, that the duty of the Secretary of the Interior in approving or disapproving the selection in question was one involving the exercise of judgment and discretion, is fully supported by the authorities. *United*

States v. *Missouri, etc., Ry.* (141 U. S., 358, 375); *Wisconsin Central R. R. Co.* v. *Price Co.* (133 U. S., 496, 511); *Runkle* v. *United States* (122 U. S., 543, 557).

Mandamus should not issue in cases of doubtful right, but only when the legal right of the party to that which he demands has been clearly established. *Life and Fire Insurance Co.* v. *Wilson's Heirs* (8 Pet., 291, 302); *Reeside* v. *Walker* (11 How., 272, 289).

THE PLEAS TO THE ANSWER.

The record shows that relator filed four pleas to defendant's answer, as to three of which a demurrer was sustained.

Whilst this action of the trial court is assigned in their brief as error, the point is not argued by counsel, and it is sufficient to say that the ruling of the court in sustaining the demurrer was on the ground that the three pleas amounted to the general issue. All evidence which could have been offered under them was equally admissible under the first plea, the demurrer to which was overruled.

ADMISSIBILITY OF DEFENDANT'S EVIDENCE.

To determine or explain what has actually been decided by a tribunal exercising judicial powers the entire record upon which the decision was reached may be examined and considered.

Neither party having required in writing a trial by jury, the issue raised by the first plea was, under the provisions of section 1278 of the "act to establish a code of law for the District of Columbia" (31 Stat., 1189, 1390), tried by the court without a jury.

This plea presented the single question, whether the Secretary of the Interior did decide, as he averred in his answer, that the relator was not a member, native or adopted, of the Wichita or affiliated bands of Indians.

The relator offered in evidence a copy of the decision of the Secretary of July 3, 1901, and there rested. (Record, pp. 22–24.) The defendant thereupon introduced his evidence.

The court found from the evidence adduced that the defendant did reach and announce a conclusion and decision that the relator was not, by nativity or adoption, a member of the Wichita and affiliated bands of Indians and therefore was not entitled to an allotment, and that thereupon defendant denied relator's application for such allotment. The court further found that the defendant disapproved relator's adoption by the Wichita tribe; and the correctness of this finding is virtually conceded on page 32 of counsel's brief. The court also ruled that the evidence was insufficient to support a finding for relator. It is our contention here, as it was below, that these findings of fact by the trial court, in an action at law, are conclusive, equally as if they were the findings of a jury, and that, counsel for relator having failed to except to the foregoing findings, and to request any findings or rulings in their behalf, this court can not now consider whether the evidence before the trial court was sufficient to justify its findings. As these conclusions were challenged by counsel at the bar of the Court of Appeals, and seem

to be questioned here, a brief consideration will be given them at this point.

The provisions of said section 1278 of the code, pertaining to issues joined in mandamus, are in part, and so far as material here, as follows:

> Such issues shall be tried by a jury if both parties in writing require it, otherwise they shall be heard and determined by the court.

By sections 70 and 71 of the code, under subchapter III prescribing the jurisdiction, procedure, etc., of the Supreme Court of the District, the following provisions are made:

> SEC. 70. Trial by court: Issues of fact in civil causes may be tried and determined by the court without the intervention of a jury whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.
>
> SEC. 71. In such case an exception may be taken to any ruling of the court during the hearing and to such finding on the ground that the evidence was insufficient in law to justify it, and may be stated in a bill of exceptions as in case of a jury trial.

It is to be observed that section 70 alone is modified by section 1278, and only with respect to the manner in which trial by jury is waived in a mandamus proceeding, and that the remaining provisions of sections 70 and 71 necessarily govern in any such proceeding

without a jury, since no contrary provision appears in the chapter devoted to the subject of mandamus.

In *Norris* v. *Jackson* (9 Wall., 125) this court considered section 4 of the act of March 3, 1865 (13 Stat., 500, 501—now substantially embodied in sections 649 and 700 of the Revised Statutes), which, after providing for the waiver of a jury trial of the "issues of fact in civil cases in any circuit court of the United States," is as follows:

> The finding of the court upon the facts, which finding may be either general or special, shall have the same effect as the verdict of a jury. The rulings of the court in the cause, in the progress of the trial, when excepted to at the time, may be reviewed by the Supreme Court of the United States upon a writ of error, or upon appeal, provided the rulings be duly presented by a bill of exceptions. When the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment.

Construing those provisions, the general similarity of which to those of the two sections of the code last above mentioned is obvious, the court thus condensed the results of its examination of that statute (*supra*, pp. 128–129):

> 1. If the verdict be a general verdict, only such rulings of the court, *in the progress of the trial*, can be reviewed as are presented by bill of exceptions, or as may arise on the pleadings.

2. In such cases a bill of exceptions can not be used to bring up the whole testimony for review any more than in a trial by jury. [See sec. 71, D. C. Code.]

3. That if the parties desire a review of the law involved in the case they must either get the court to find a special verdict which raises the legal propositions, or they must present to the court their propositions of law and require the court to rule on them.

4. That objection to the admission or exclusion of evidence, or to such ruling on the propositions of law as the party may ask, must appear by bill of exceptions.

In the later case of *Miller* v. *Life Insurance Co.* (12 Wall., 285), which also was tried by the court without a jury, pursuant to the act of 1865, it was said (pp. 299–300):

Suppose the facts proved to have been as assumed by the defendants in their requests, then it might well be conceded that the judgment was for the wrong party, but the issues of fact were tried and determined by the circuit court, and the act of Congress provides that the finding of the circuit court in such cases shall have the same effect as the verdict of a jury, and the Constitution provides that no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law. Facts so tried could only be reexamined under the rules of the common law either by the granting of a new trial by the court where the issue was tried or to which the

> record was returnable, or by the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings. Matters of fact found by the circuit court under such a submission can not be reexamined here, as by the express language of the act the review, when the finding is general, is confined to the rulings of the court in the progress of the trial, and even when the finding is special, nothing else is open to review except the inquiry whether the facts found are sufficient to support the judgment.

In *Kearney* v. *Case* (12 Wall., 275, 283), speaking of the same act, it was said—

> that it was the intention to enact that if parties who consent to waive a jury desire to secure the right to a review in the Supreme Court of any question of law arising in the trial, they must first file their written stipulation, *and must then ask the court to make a finding of such facts as they deem essential to the review, and ask the ruling of the court on points to which they wish to except.* If this is not done the parties consenting to waive a jury stand as they did before the statute, concluded by the judgment of the court on all matters submitted to it. [Italics borrowed.]

Further upon the propositions italicised in the foregoing quotation may be cited *Insurance Co.* v. *Sea* (21 Wall., 158, 160); *Retzer* v. *Wood* (109 U. S., 185, 188); *Martinton* v. *Fairbanks* (112 U. S., 670, 672–674); *Lehnen* v. *Dickson* (148 U. S., 71).

Prior to the act of 1865 no question decided by the court below, whether of fact or law, could be re-examined and revised by this court upon a writ of error where the parties had submitted the trial of the cause to the court without a jury; and it was deemed necessary "to require in all cases, where the parties see fit to avail themselves of the privileges of the act, a reasonably strict conformity to its regulations." *Flanders* v. *Tweed* (9 Wall., 425.) See also, *Kearney* v. *Case* (*supra*); *Gilman* v. *Ill. & Miss. Tel. Co.* (91 U. S., 603, 614); *Boogher* v. *Insurance Co.* (103 U. S., 90, 95); and authorities cited in those cases.

Objections to the admission or rejection of evidence, or to such rulings or propositions of law as may be submitted to the court, must be shown by bill of exceptions. (*Norris* v. *Jackson*; *Insurance Co.* v. *Sea*; *Martinton* v. *Fairbanks*; *supra.*)

The sections of the code above given do not, indeed, as did the act of 1865, in terms provide that in the case of a special finding "the review may also extend to the determination of the sufficiency of the facts found to support the judgment," but authorize an exception to a "finding on the ground that the evidence was insufficient in law to justify it," to "be stated in a bill of exceptions as in case of a jury trial." However, of whatever force, if any, this difference might be, the fact remains that in this case no exception upon any ground was taken to the ultimate facts or findings upon which the judgment is based.

The only question, therefore, presented by the record upon this branch of the case is the admissibility of the evidence, and the answer is brief.

Part of the evidence, consisting of the official communications of June 7, 1895 (record, p. 26), April 18, 1901 (record, p. 31), and February 7, 1898 (record, p. 37), was offered to prove the allegations in defendant's answer with respect to, and to explain, his decision of July 3, 1901. It will be observed that not only does that decision (record, p. 24) in terms refer to and quote from the said official communication of April 18, 1901, which in turn expressly refers to the other and preceding communications thus offered in evidence, but the defendant's answer specifically recites (record, p. 11) that it was "upon full consideration" of relator's application and his proofs and of "such other evidence and proofs bearing thereon as was embodied in the public records and files of the Indian Bureau and in the Department of the Interior" that the decision in question was reached.

These communications, therefore, were part of the record of the case before the Secretary and upon which his decision was reached and based. The scope and meaning of a judgment or decision may always be ascertained by examination of the pleadings, evidence, findings, or other portions of the record. *Last Chance Mining Co.* v. *Tyler Mining Co.* (157 U. S., 683, 690); *Baker* v. *Cummins* (181 U. S., 117); *National Foundry and Pipe Works* v.

Oconto Water Supply Co. (183 U. S., 216, 234). The admissibility of this evidence is therefore obvious.

The Commissioner's letter of April 18, 1901, considers exhaustively and in detail the history of the relator's relations with the Wichita band of Indians. Therefrom it appears that on February 7, 1898, Secretary Bliss, predecessor in office of this defendant in error, concurring in the recommendation of the Commissioner of Indian Affairs in the letter of June 7, 1895, expressly and pointedly disapproved the applications for admission to the tribes of 29 persons, as voted upon by the Indians, for and against, and among the number was relator, who claims membership with the Wichita Indians by marriage and adoption long prior to 1891. The erroneous enrollment of relator on the Wichita grass-payment rolls is also therein related. The history of the case is amplified by the letters of June 7, 1895, and February 7, 1898. Concurring in the Commissioner's repeated recommendation of April 18, 1901 (record, p. 37), and in view of the situation disclosed by the correspondence in question, taken in connection with all other data then before him, this defendant in error set a second veto upon relator's adoption and decided that he was not a member of the tribe and therefore not entitled to an allotment.

The defendant also offered in evidence duly certified copies of letters of the Secretary of the Interior, dated December 13, 1884, and September 8, 1900, and of the Commissioner of Indian Affairs, dated February 27, 1886, April 3, 1894, and September 30,

1901, respectively (record, p. 38 et seq.), merely to show what had long been the views and practice of the Department and Indian Office with respect to tribal adoptions; and their admission could not have been prejudicial to relator upon the issue of fact.

Certified copies of paragraph 162 of the revised official regulations of the Indian Department, approved September 22, 1884, paragraph 157 of the revised regulations, approved December 28, 1893, and paragraph 327 of those approved March 1, 1904 (record, pp. 25–26), were offered in evidence merely as a convenient means of bringing them to the attention of the court. As official regulations of the executive department they were judicially cognizable (*Caha* v. *United States*, 152 U. S., 211, 221), and therefore no error can be predicated on their admission in evidence.

The letters last mentioned and the official regulations were properly receivable in evidence for the purpose, as they were offered, of exhibiting to the court the departmental construction of the statutes under which the Secretary had acted in relator's case and the long-continued practice in that respect. Even if inadmissible, their reception did not prejudice the relator, as they were not introduced or considered with reference to any disputed question of fact, but were introduced solely for the purpose of assisting the court upon the legal question there involved.

As was the case before the Court of Appeals, the brief of counsel for relator contains a general discussion of the question of the power and authority of the Sec-

retary of the Interior to supervise and control these Indian adoptions. As has been pointed out, this question is not raised upon the present record. It was prominent in the case before the trial court and, as appears in the opinion of the trial justice (record, p. 21), he ruled, at the request of counsel for the defendant, as matter of law—

> that before any person can be entitled to an allotment of land under the act of Congress approved March 2, 1895, ratifying the agreement of June 4, 1891, as an adopted member of the Wichita or any affiliated band of Indians, such person must show that his adoption as such member has been approved by the Secretary of the Interior.

As counsel for the relator saved no exception to this ruling of the trial court, they are to be deemed as having acquiesced and are bound by it. In view of their argument upon the subject, however, and as the question is one of manifest importance, upon which the Court of Appeals expressed its opinion and which this court may deem it proper to consider, it will be discussed in these pages at some length.

JURISDICTION AND AUTHORITY OF THE SECRETARY.

The Indian tribes sustain relations of complete dependency toward the United States, are wards of the Government, and are subject to such full control as may be prescribed by the sovereign guardian.

In the early case (1831) of *Cherokee Nation* v. *Georgia* (5 Pet., 1, 16–17) Chief Justice Marshall, speaking for the court, said:

> The condition of the Indians in relation to the United States is perhaps unlike that of any

other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term "foreign nation" is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.

* * * * *

They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

They look to our Government for protection; rely upon its kindness and its power; appeal to it for relief to their wants, and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.

In *United States* v. *Kagama* (118 U. S., 375, 383–438) it is said:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights.

> They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

Speaking of this relationship, the court, in *Choctaw Nation* v. *United States* (119 U. S., 1, 27), said:

> The United States is a sovereign nation, not suable in any court except by its own consent, and upon such terms and conditions as may accompany that consent, and it is not subject to any municipal law. Its government is limited only by its own constitution, and the nation is subject to no law but the law of nations. On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent state or sovereign nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the Government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative power.

In *Cherokee Nation* v. *Kansas Railway Co.* (135 U.S., 641, 653–655) it is said:

> The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several States are sovereign, and that that nation alone can exercise the power of eminent domain within its limits finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of Congress defining the relations of that people with the United States. From the beginning of the Government to the present time they have been treated as "wards of the nation," "in a state of pupilage," "dependent political communities," holding such relations to the General Government that they and their country, as declared by Chief Justice Marshall in *Cherokee Nation* v. *Georgia*, 5 Pet., 1, 17, "are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands or to form a political connection with them would be considered by all as an invasion of our territory and an act of hostility." It is true, as declared in *Worcester* v. *Georgia*, 6 Pet., 515, 557, 569, that the treaties and laws of the United States contemplate the Indian Territory as completely separated from the States and the Cherokee Nation as a distinct community, and (in the language of Mr. Justice McLean, in the same case, p. 583) that "in the executive, legislative, and judicial branches of our Government we have admitted,

by the most solemn sanction, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a State or separate community." But that falls far short of saying that they are a sovereign State, with no superior within the limits of its territory.

By the treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to the Cherokee Nation should at no future time, without their consent, be included within the territorial limits or jurisdiction of any State or Territory, and that the Government would secure to that nation "the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country, belonging to their people, or such persons as have connected themselves with them;" and, by the treaties of Washington, 1846 and 1866, the United States guaranteed to the Cherokees the title and possession of their lands, and jurisdiction over their country. (Revision of Indian Treaties, pp.65, 79, 85.) But neither these nor any previous treaties evinced any intention upon the part of the Government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits. This is made clear by the decisions of this court, rendered since the cases already cited. In *United States* v. *Rogers* (4 How., 567, 572), the court, referring to the

> locality in which a particular crime had been committed, said: "It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States, and under their authority. * * * We think it too firmly and clearly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority."

In *Stephens* v. *Cherokee Nation* (174 U. S., 445, 486–488), after quoting the utterances of the court in the preceding cases with respect to the control of the Government over the Indians and their affairs, it was added:

> Such being the position occupied by these tribes (and it has often been availed of to their advantage), and the power of Congress in the premises having the plenitude thus indicated, we are unable to perceive that the legislation in question is in contravention of the Constitution.

By the act of June 10, 1896, the Dawes Commission was authorized "to hear and determine the application of all persons who may apply to them for citizenship in said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled," but it was also provided:

> "That in determining all such applications said Commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties

with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations, or tribes:

And provided further, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes, and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof."

* * * * *

We repeat that in view of the paramount authority of Congress over the Indian tribes, and of the duties imposed on the Government by their condition of dependency, we can not say that Congress could not empower the Dawes Commission to determine, in the manner provided, who were entitled to citizenship in each of the tribes and make out correct rolls of such citizens, an essential preliminary to effective action in promotion of the best interests of the tribes. It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which

the right to a share in the latter would not necessarily follow from the concession of the former.

In the more recent case of *Lone Wolf* v. *Hitchcock* (187 U. S., 553, 565–568) the court said:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations (Chinese Exclusion Case, 130 U. S., 581, 600), the legislative power might pass laws in conflict with treaties made with the Indians. (*Thomas* v. *Gay*, 169 U. S., 264, 270; *Ward* v. *Race Horse*, 163 U. S., 504, 511; *Spalding* v. *Chandler*, 160 U. S., 394, 405; *Missouri, Kansas and Texas Ry. Co.* v. *Roberts*, 152 U. S., 114, 117; *The Cherokee Tobacco*, 11 Wall., 616.)
>
> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the Government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United

> States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith toward the Indians.
>
> * * * * *
>
> In view of the legislative power possessed by Congress over treaties with the Indians and Indian tribal property, we may not specially consider the contentions pressed upon our notice that the signing by the Indians of the agreement of October 6, 1892, was obtained by fraudulent misrepresentations and concealment; that the requisite three-fourths of adult male Indians had not signed, as required by the twelfth article of the treaty of 1867, and that the treaty as signed had been amended by Congress without submitting such amendments to the action of the Indians, since all these matters, in any event, were solely within the domain of the legislative authority and its action is conclusive upon the courts.

It is true that for a considerable period of time the Indian tribes were dealt with as occupying a *quasi* independent position, in that treaties were negotiated with them. Experience having eventually demonstrated the impolicy of this course, however, a wide departure in the scheme of their government was determined upon. Direct general control and guardianship over the Indians were assumed by a provision of the act of March 3, 1871 (16 Stat., 544, 566), after-

wards substantially incorporated into the Revised Statutes as section 2079, as follows:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired.

By the foregoing decisions, which are thus set forth for the convenience of the court, the dependency of the Indian tribes and their subjection to Federal control are defined as without limitation; and such plenitude of supervision was the object of the statute. The specific restrictions laid upon the Indians from time to time and from time to time upheld by the courts, with respect to their tribal relations and tribal affairs, only serve to emphasize the principle that their right of management and regulation of their internal affairs depends upon the extent of the exercise of the authority vested in the Federal Government. Among these affairs tribal adoptions are of manifest importance, as intimately affecting, for better or worse in individual cases, the welfare of the Indians, and obviously of serious concern to the Government as the guardian.

Not with respect to all matters arising out of their tribal or domestic relations has the Government sought to interfere, but has given its express or implied sanction to their own regulation of many such

matters. That a stranger can not acquire the status of a tribal Indian, by marriage or adoption, without the Federal sanction has been held by the Supreme Court of Montana, in the case of *Stiff* v. *McLaughlin* (48 Pac. Rep., 232, 234), an action brought against the sheriff of Missoula County and his bondsmen because of his refusal to levy an execution upon the property of a judgment debtor (Sloan) in the latter's possession on the Flathead Indian Reservation in that county, which refusal it was sought to justify on the ground that Sloan was a quarter-blood Chippewa, married to an Indian woman of the Flathead tribe and residing with his wife on the Flathead Reservation with the consent of the United States, the court saying:

> The marriage of a man not an Indian to an Indian woman does not give him the status of a tribal Indian, nor does he acquire such a status from the fact that he resides upon an Indian reservation with an Indian wife. Unless in the Government's treaty with the Flathead Indians themselves, or under some act of Congress, a right was expressly given the Flathead Indians to adopt persons other than tribal Indians of Washington Territory into their tribe, no court would be justified in holding that any such right existed. Their treaty gave no such right to the Flatheads as we have stated, and we know of no law conferring any such right. Nor from the fact that the United States authorities permitted Sloan to reside on the reservation can it be reasonably inferred that he had acquired, or that it was intended by the Government that he should acquire, the status of a tribal Indian.

Adoptions by the Wichita and affiliated bands of Indians, or either of them, are subject to approval or disapproval by the Secretary of the Interior under the jurisdiction and authority expressly conferred, and the duty laid, upon him by law.

In their brief here (p. 20), as in their argument below, counsel for relator concede the unqualified power of Congress with respect to the Indian tribes generally, but deny the delegation of any such power to the Secretary of the Interior. At page 29 of their brief they contend "that the executive officers of the United States Government have no inherent right to sit in judgment upon the question of tribal membership, but that the tribe itself is supreme as to that question, as it is admitted to have been in the early history of America, and that such right of supervision as may now be claimed to exist must exist alone by virtue of some law of Congress as to that particular tribe, or some treaty between that tribe and the United States conferring such authority."

The Secretary of the Interior, be it said, has not sought to exercise the unlimited powers of which Congress is the repository; and the present question is solely as to his power and authority to place an effective veto upon relator's adoption by the Wichita Indian tribe. To hold that this power and authority may not lawfully be conferred upon him would be to present the anomaly of legislation by Congress, the legislative, not the administrative, branch of the Government, upon a subject within its unquestioned province and absolute control, which can not be executed and administered by the coordinate department, or its

representative, empowered and charged with such duties under the Constitution. The inquiry, then, passes naturally to the existing legislation.

The jurisdiction and authority of the Secretary respecting these Indian matters are defined by sections 441 and 463, Revised Statutes, as follows:

> SEC. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:
>
> * * * * *
>
> Third.—The Indians.
>
> * * * * *
>
> SEC. 463. The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations.

Counsel for relator, at page 18 of their brief, seek to avoid the effect of, and qualify, these provisions by urging that the word "relations," in section 463, is to be interpreted as having in contemplation only those subsisting between the Indians and the Government, and none purely internal. To support their contention the cases of *Sah Quah* (31 Fed. Rep., 327), *United States* v. *Kagama* (118 U. S., 375), and *Earl* v. *Godley* (44 N. W. Rep., 254), and an opinion by the Attorney-General (20 Opin., 711), are cited and certain utterances of the courts and the Attorney-General therein, in apparent recognition of the right of tribal self-government with respect to internal or

domestic affairs, are quoted. These quotations, however, standing alone, are wholly misleading, the judicial utterances suggesting conclusions opposite to those reached.

In neither of the cases nor the opinion was either of the sections in question mentioned or any exercise of authority thereunder the subject of controversy or consideration. Even without reference to the facts to which they were addressed, these utterances palpably are with respect to what had been, or was understood to have been, the indulgence of the Government toward the Indians generally. In none of them is a right of self-government in respect of any matter held to be inviolable in the Indians as against the Federal authority.

The sections in question are not susceptible of the forced and narrow construction contended for by connsel. To sustain that construction would be to interpolate the last clause of section 463 and to ignore altogether the preceding clause, which invests the Secretary with the "management of *all Indian affairs*"—a modification of those provisions which would amount to positive legislation. If any such qualification had been intended by Congress, apt words for that purpose could easily and would have been added.

By those sections of the statutes the Secretary is expressly charged and commissioned by Congress with the management of all affairs of the Indians and of all matters arising out of their relations. The language employed is unqualified and comprehensive and the

authority conferred is wide. "Management" involves the exercise of judgment, to be expended in the ascertainment and conservation of the interests of the Indians and the Government. In the discharge of his duty to this end, that unfit persons may not impose themselves upon the Indians, and that the latter may not by indiscriminate adoptions improvidently divide and subdivide their substance and multiply the burdens of the General Government as the guardian, the Secretary has found it necessary, in the exercise of his authority concerning the Indian affairs and relations, to supervise and regulate these adoptions.

Obviously, if one such adoption can be made any number can be made and the tribe doubled or trebled in number, or increased in any greater degree, all of whose added members might then lay claim to equal shares in the tribal property and to the special care and protection of the Government. It has not been sought by the Secretary to assume the active functions of the Indians themselves. With them remains the initiative—the right and choice of its exercise, as they will. The action of the Secretary in any such case is supervisory and regulatory, either in approval or disapproval, merely. That it is within the executive province, under the broad authority conferred, is clear. If the Secretary is without this power and authority, then he has not "the management of *all Indian affairs* and of *all matters* arising out of Indian relations" with which the statute professes to endow him.

In this connection it was said by the Court of Appeals, in the course of its later opinion in this case (26 App. D. C., 290, 295):

> Congress having given very general powers to the Secretary of the Interior to deal with the Indians, we think that he is empowered to provide that an adoption by an Indian tribe of a person not an Indian must be approved by the Secretary of the Interior or his subordinate, the Commissioner of Indian Affairs. This is a proper regulation and one in the interest of the Indians. But, in the absence of any such regulation at a time when adoption is claimed, still the power to inquire into and decide that question is given by the agreement under which allotment is claimed by the relator.

But counsel again refer (brief, p. 8) to the following expression in the original opinion of the Court of Appeals (19 App., D. C., 333, 342–343), to the effect that no denial of relator's adoption had been made and that—

> none well could be made in view of the well-established custom of the Indians for over two hundred and fifty years to admit white men into membership of their several tribes by the process of adoption, and in view of the uniform recognition of this custom by the Government of the United States.

It is to be borne in mind, however, that the case was on that occasion before the court on the petition and demurrer, the allegations of the former being

taken as conceded by the latter to be true. Among them was the allegation that relator had since his marriage in all particulars and respects been treated and recognized as a member of the Wichita tribe both by the Indians and by the constituted authorities of the United States.

In speaking of the "well-established custom of the Indians for over two hundred and fifty years to admit white men into membership of their several tribes by the process of adoption," Mr. Justice Morris merely stated an historical fact; and his reference to "the uniform recognition of this custom by the Government of the United States" follows as an element of the general proposition. But here is a case, as shown by the present pleadings and evidence, in which this recognition not only has not been accorded but has twice been refused.

It has been argued by counsel for relator that the assertion on the part of the Secretary of the Interior of the right to regulate and control Indian adoptions is a new doctrine, and averring that express provision for such control was not made prior to the official regulations approved December 28, 1893 (record, p. 25), a time subsequent to relator's claimed marriage and adoption, they contend that no retroactive effect can be given that provision of the regulations and that no such control can be exercised in his case.

In their premises counsel are in manifest error, and their contentions made in this behalf are wholly untenable. For the express purpose of proving, as herein-

before indicated, that the right of approval and disapproval of such adoptions was openly declared and exercised long prior to relator's claimed marriage and adoption by vote of the Indians, the defendant Secretary introduced in evidence at the trial the certified copies of the correspondence exhibited on pages 38–44 of the transcript of the record, which, as will be seen, goes back to the year 1884—in fact, discloses that permission to adopt white men was on one occasion denied the Indians as long ago as 1873. The absence, in any event, of a formal official regulation on the subject could have no effect upon the question. Obviously the power and authority of the Secretary to regulate and control these Indian adoptions flow from no official regulation by him to that effect, but, on the contrary, the virtue of the regulation rests upon the authority vested in him by law to exercise such supervision and control.

That the Indians themselves understood and considered their action to be subject to review by the Secretary will appear by reference to that portion (found on page 34 of the transcript of the record) of the communication of the Commissioner of Indian Affairs, April 18, 1901, to the Secretary of the Interior, wherein the latter was officially advised that, through the Indian agent, the Indians had unanimously expressed the wish that the adoption of relator, as voted upon by them in general council, "receive the approval of the Department and that his name be duly enrolled as a member of the Wichita tribe of the affiliated bands." This

recognized right of review and control may therefore be said to have become a part or feature of the Indian custom in this particular.

The now long-continued practice, established by the evidence, of thus regulating and controlling these Indian adoptions, pursuant to the executive interpretation of the sections of the Revised Statutes in question, will not be disturbed by the courts unless manifestly erroneous. *United States* v. *Finnell* (185 U. S., 236, 243–244); *Hawley* v. *Diller* (178 U. S., 476, 488); *United States* v. *Johnston* (124 U. S., 236, 253); *United States* v. *Moore* (95 U. S., 760, 763); *United States ex rel. Wedderburn* v. *Bliss* (12 App. D. C., 485). The authorities upon this point are numerous.

The unqualified provisions of sections 441 and 463, Revised Statutes, fully embrace the authority exercised in this instance, and clearly were designed to avoid the necessity for specific legislation with respect to each of the multitude of matters daily arising in the course of administration.

United States v. *Macdaniel* (7 Pet., 1) furnishes an instance and a clear exposition of the principle. The Government sued to recover from the defendant, who, while a clerk in the Navy Department at an annual salary, had acted as agent for the payment of money due to navy pensioners and also as special agent for the navy disbursements upon a special allowance of commissions for such services by direction of the Secretary of the Navy, it being contended at the bar that

he had no right by law to the commissions. Said this court (pp. 14–15):

> A practical knowledge of the action of any one of the great Departments of the Government must convince every person that the head of a Department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the Government. Hence, of necessity, usages have been established in every Department of the Government which have become a kind of common law and regulate the rights and duties of those who act within their respective limits.

The case of *Dastervignes* v. *United States* (122 Fed. Rep., 30) directly involved a regulation by the Secretary of the Interior prohibiting the pasturing of sheep and goats on the public lands in forest reser-

vations, with respect to which the circuit court of appeals for the ninth circuit said in part (pp. 34–35):

> The Secretary, by adopting this rule, acted simply as the arm that carries out the legislative will. He did not invade any of the functions of Congress. He did not make any law, but he exercised the authority given to him, and made rules to preserve the forests on the reservations from destruction. Such rules, within constitutional limits, have the force and effect of law, and it is the duty of courts to protect and enforce them in order to uphold the law as enacted by Congress. As was said by the court in Locke's Appeal (72 Pa., 491, 499, 13 Am. Rep., 716):
>
> "To deny this would be to stop the wheels of Government. There are many things upon which wise and useful legislation must depend which can not be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."
>
> The national courts have universally upheld and sustained such rules and regulations made by its administrative officers, under the authority given by an act of Congress, whenever made necessary to carry out and enforce the provisions of the law. "It is a general principle of law, in the construction of all powers of this sort, that, where the end is required, the appropriate means are given." (*United States* v. *Bailey*, 9 Pet., 238, 255, 9 L. Ed., 113.) There are many acts of Congress

which are regulated by direct legislation, wherein general provisions are made concerning the subject-matter thereof, and in such acts, wherever it becomes necessary so to do, authority may be conferred and power given to an administrative officer, who is required by the law to act under its general provisions, to prescribe the details which must be pursued in the execution thereof, for, as was said by Chief Justice Marshall in *Wayman* v. *Southard* (10 Wheat., 1, 43, 6 L. Ed., 253), "Congress may certainly delegate to others powers which the legislature may rightfully exercise itself."

The views upon this subject, which we have briefly expressed, are sustained by numerous authorities: *Field* v. *Clark*, 143 U. S., 649, 693, 12 Sup. Ct., 495, 36 L. Ed., 294; *Caha* v. *United States*, 152 U. S., 212, 222, 14 Sup. Ct., 513, 38 L. Ed., 415; *Bushnell* v. *Leland*, 164 U. S., 684, 685, 17 Sup. Ct., 209, 41 L. Ed., 598, and authorities there cited; *Railway Co.* v. *Ohio*, 165 U. S., 365, 17 Sup. Ct., 357, 41 L. Ed., 747; *United States* v. *Ormsbee* (D. C.), 74 Fed., 207, 209; *United States* v. *City of Moline* (D. C.), 82 Fed., 592, 598; *Grady* v. *United States*, 39 C. C. A., 42, 98 Fed., 239; *Chatfield* v. *City of New Haven* (C. C.), 110 Fed., 788, 792.

Whatever intimately affects the tribal condition of the Indians touches the interest of the guardian government, invokes "supervision" by the Secretary as "public business relating to * * * the Indians," and is within the scope of his "management of all Indian affairs and of all matters arising out of Indian relations."

The case of *Sloan* v. *United States* (95 Fed. Rep., 193), cited by counsel, was a suit brought by Sloan in the Circuit Court for the District of Nebraska, pursuant to the actof Augnst 15, 189[illegible] (28 Stat., 305), which authorized the institution of any such suit by "persons who are in whole or in part of Indian blood or descent," entitled or claiming to be entitled to an allotment of land under any law of, or grant by, Congress, or claiming to have been unlawfully denied such allotment. Sloan, a mixed-blood Omaha Indian, claimed to be entitled to allotment of a certain tract, which he had improved, under the acts of Congress providing for allotments in severalty "to the Indians of said tribe," and which had been denied him by the agents and officials of the Land Department on the ground that he was not within the class of beneficiaries contemplated by the grant.

Under the special jurisdiction conferred by the act first mentioned the court held, *inter alia*, that the granting act did not distinguish between Indians of the whole and of mixed blood. Indeed, the jurisdictional act, which authorized suit by "all persons who are in whole or in part of Indian blood or descent," might have been taken as a legislative interpretation of the granting act, and was distinctly a legislative recognition of the jurisdiction of the executive authorities in the first instance to determine who were entitled to participate in the benefits of the grant. But, again, no question of adoption or of the executive authority to regulate and control it was involved.

The case of *Jones* v. *Meehan* (175 U. S., 1), which counsel cite as of controlling force here, is not at all in point. That controversy involved as its basis a tract of land the fee simple to which, without limitation or restriction of any character, it was held, had passed out of the United States by grant to one Moose Dung, a principal chief of the Red Lake band of Chippewa Indians, at whose death the title, in accordance with what was determined upon the evidence adduced in the case before a special examiner to be the established and recognized tribal custom in that particular, descended to and vested exclusively in his eldest son and successor as chief, also called Moose Dung, between whose successive lessees the controversy arose. This court held that the title had *vested* in that son, and that the rights acquired under his lease to the plaintiff in the suit could not be divested by any subsequent action of the lessor, or of Congress, or of the Executive Departments; but, it should be observed, the determination by the Secretary of the Interior concerning the title (with a direction for the distribution of the rents and profits of the land among the several surviving children of Moose Dung the elder), antedating the judicial inquiry and determination, was based wholly upon a different *finding* with respect to the tribal customs governing descents, made by the local Indian agent whose investigation was undertaken at the direction of the Commissioner of Indian Affairs. Upon the ground thus afterwards traversed in the judicial proceeding, touching the question of the tribal customs

by which such descents were cast, therefore, the determinative element of the case was ascertained and held to be a vested, indefeasible estate in fee simple in Moose Dung the younger; and with such estates not only the Secretary of the Interior, but, the court significantly added, Congress itself could not in any manner interfere.

The case of *Nofire* v. *United States* (164 U. S., 657), also cited and relied upon by counsel, is equally out of point. In that case the judgment of the United States Circuit Court for the Western District of Arkansas, wherein the plaintiffs in error (Cherokee Indians) had been convicted of the murder of a white man "at the Cherokee Nation in the Indian country," was reversed upon proof in the record of the prior adoption of the deceased by the Cherokee Nation, by reason whereof the jurisdiction of the Federal Court was ousted. That case is widely distinguishable from the present in that, *inter alia*, no question was made of the *validity* of that adoption at the hands of the Cherokee Nation alone, which the executive had in no wise sought to control, the right of practically unrestricted self-government having been secured to that nation by formal treaties with the United States, notably that of 1835 (7 Stat., 478), preserved under the saving clause of section 2079, Revised Statutes, and thereafter recognized by provisions contained in the acts of May 2, 1890 (26 Stat., 81, 96), and June 7, 1897 (30 Stat., 62, 84), the latter subsequent to the decision in question. The position of the Wichita and affiliated bands of Indians is far

short of that occupied by the Cherokees, one of the Five Civilized Tribes (Choctaws, Chickasaws, Cherokees, Creeks, and Seminoles), all of whom enjoy substantially the same rights and privileges.

The same distinction applies with respect to the cases of *Turner* v. *Fish* (28 Miss., 306), *United States* v. *Rogers* (4 How., 567), *Roff* v. *Burney* (168 U. S., 218), *Stephens* v. *Cherokee Nation* (174 U. S., 445), and manuscript decisions in *Senter* v. *Choctaw Nation* and *Tucker* v. *Choctaw Nation*, also cited by counsel, so far as they in any sense relate to this phase of the case.

O'Brien v. *Bugbee* (26 Pac. Rep., 428) involved only the descent of a tract of land, situate in the State of Kansas, which was held to have been cast by the customs of the Shawnee Indian tribe, recognized by the United States, and not by the laws of the State.

The case of *Seneca Nation* v. *Lehley* (8 N. Y. Sup., 245) involved a dispute as to whether a certain tract of the lands of the Seneca Nation of Indians, held by them under certain provisions of the New York statutes as a distinct community, had been laid out or set apart in accordance with the statutory authority given the chiefs, and whether the statutory prohibition against alienation except to another Indian of the nation operated to exclude a half-breed from succession in interest. The laws of New York only were involved, no question of Federal authority being present.

The power and authority to determine what persons are entitled to allotments under Article II of the

agreement (Appendix) must necessarily rest with some officer or tribunal; and in the absence of other designation it follows that Congress intended the exercise of jurisdiction to that end by the tribunal or authority having supervision and control of the Indians and their affairs, as well as with respect to the disposition of the relinquished lands, by the authorities having control of such matters. *Bishop of Nesqually* v. *Gibbon* (158 U. S., 155, 167); Indian Allotments (28 L. D., 564, 567, 568).

The sale and disposition of the public domain is under the jurisdiction of the Commissioner of the General Land Office, subject to the direction of the Secretary of the Interior. Sec. 453, Revised Statutes; *Knight* v. *U. S. Land Association* (142 U. S., 161, 177).

The selection of allotments under Article II of the agreement is not complete until "approved" by the Secretary of the Interior (Article IV). The word "approved," in that connection, confers a judicial power and duty upon that officer. *Wisconsin Central R. R. Co.* v. *Price Co.* (133 U. S., 496, 511, 513); *United States* v. *Missouri &c. Ry. Co.* (141 U. S., 358, 375–376).

The regulations of the Department, pursuant to and to effectuate the authority of the Secretary, providing that tribal adoptions must have departmental approval, have the further sanction of sections 161 and 465, Revised Statutes.

In making these regulations the Secretary of the Interior was acting for the President. *Runkle* v.

United States (122 U. S., 543, 557), and authorities therein cited.

These rules and regulations, made pursuant to law, have the force and effect of law, and the courts take judicial notice of them. *United States* v. *Eliason* (16 Pet., 291, 302); *Gratiot* v. *United States* (4 How., 80, 117); *Ex parte Reed* (100 U. S., 13, 22); *Kurtz* v. *Moffitt* (115 U. S., 503); *Caha* v. *United States* (152 U. S., 211, 221); *Boske* v. *Commingore* (177 U. S., 459, 467, 470); *Cosmos Co.* v. *Gray Eagle Co.* (190 U. S., 301, 309); 21 Opin. Attorney-General, 122; *United States* v. *Barrows* (1 Abb., 351); *Low* v. *Hanson* (72 Me., 104).

It is respectfully submitted that the judgment below should be affirmed.

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APPENDIX.

Agreement ratified by the act of Congress entitled "An act making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-six, and for other purposes," approved March 2, 1895 (28 Stat., 876, 895–7).

Articles of agreement made and entered into at Anadarko, in the Indian Territory, on the 4th day of June, A. D. 1891, by and between David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, commissioners on the part of the United States, and the Wichita and affiliated bands of Indians in the Indian Territory.

ARTICLE I.

The said Wichita and affiliated bands of Indians in the Indian Territory hereby cede, convey, transfer, relinquish, forever and absolutely, without any reservation whatever, all their claim, title, and interest of every kind and character in and to the lands embraced in the following-described tract of country in the Indian Territory, to wit:

Commencing at a point in the middle of the main channel of the Washita River, where the ninety-eighth meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the

line of 98° 40′ west longitude, thence on said line of 98° 40′ due north to the middle of the channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the ninety-eighth meridian, thence due south to the place of beginning.

ARTICLE II.

In consideration of the cession recited in the foregoing article, the United States agrees that out of said tract of country there shall be allotted to each and every member of said Wichita and affiliated bands of Indians in the Indian Territory, native and adopted, one hundred and sixty acres of land, in the manner and form as follows:

Said tract of country shall be, by the United States, classified into grazing and grain-growing land, and when so classified each of said Indians shall be required to take at least one-half in area of his or her allotment in grazing land, subject to the foregoing and other restrictions hereinafter recited. Each and every member of said Wichita and affiliated bands of Indians in the Indian Territory over the age of eighteen years shall have the right to select for himself or herself one hundred and sixty acres of land to be held and owned in severalty, but to conform to legal surveys in boundary as nearly as practicable; and that the father, or, if he be dead, the mother (if members of said tribe or bands of Indians) shall have the right to select a like amount of land, under the same restrictions, for each of his or her children under the age of eighteen years; and that the Commissioner of Indian Affairs, or some one appointed by him for the purpose, shall select a like amount of land, under the same restrictions, for each orphan child belonging to

said tribe or bands of Indians under the age of eighteen years.

It is hereby further expressly agreed that no person shall have the right to make his or her selection of land in any part of said tract of country that is now used or occupied, or that has been or may hereafter be set apart for military, agency, school, school farm, religious, town site, or other public uses, or in sections sixteen (16) and thirty-six (36) in each Congressional township, except, in cases where any member of said Wichita and affiliated bands of Indians has heretofore made improvements upon and now occupies and uses a part of said sections sixteen (16) and thirty-six (36), such Indian may make his or her selection, according to the legal subdivisions, so as to include his or her improvements. It is further agreed that wherever in said tract of country any one of said Indians has made improvements and now uses and occupies the land embracing such improvements, such Indian shall have the undisputed right to make his or her selection, to conform to legal subdivisions, however, so as to include such improvements without reference to the classification of land hereinbefore recited.

ARTICLE III.

All allotments hereunder shall be selected within ninety days from the ratification of this agreement by Congress of the United States; provided the Secretary of the Interior, in his discretion, may extend the time for making such selection; and should any Indian entitled to allotments hereunder fail or refuse to make his or her selection of land in such time, then the allotting agent in charge of the work of making such allotments shall, within the next thirty (30) days after said time, make allotments to such Indians, which

shall have the same force and effect as if the selections were made by the Indians themselves.

ARTICLE IV.

When said allotments of land shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior, the titles thereto shall be held in trust for the allottees, respectively, for a period of twenty-five (25) years, in the manner and to the extent provided for in the act of Congress entitled "An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes." Approved February 8, 1887. And at the expiration of twenty-five (25) years the title thereto shall be conveyed in fee simple to the allottees, or their heirs, free from all incumbrances.

ARTICLE V.

In addition to the allotments above provided for and the other benefits to be received under the preceding articles, said Wichita and affiliated bands of Indians claim and insist that further compensation in money should be made to them by the United States for their possessory right in and to the lands above described in excess of so much thereof as may be required for their said allotments. Therefore, it is further agreed that the question as to what sum of money, if any, shall be paid to said Indians for such surplus lands shall be submitted to the Congress of the United States, the decision of Congress thereon to be final and binding upon said Indians; provided, if any sum of money shall be allowed by Congress for surplus lands, it shall be subject to a reduction for

each allotment of land that may be taken in excess of one thousand and sixty (1,060) at that price per acre, if any, that may be allowed by Congress.

ARTICLE VI.

It is further agreed that there shall be reserved to said Indians the right to prefer against the United States any and every claim that they may believe they have the right to prefer, save and except any claim to the tract of country described in the first article of this agreement.

ARTICLE VII.

It is hereby further agreed that wherever, in this reservation, any religious society or other organization is now occupying any portion of said reservation for religious or educational work among the Indians the land so occupied may be allotted and confirmed to such society or organization; not, however, to exceed one hundred and sixty acres (160) of land to any one society or organization, so long as the same shall be so occupied and used, and such land shall not be subject to homestead entry. That whenever said lands are abandoned for school purposes the same shall revert to said Indian tribes and be disposed of for their benefit.

ARTICLE VIII.

This agreement shall have effect whenever it shall be ratified by the Congress of the United States.

In witness whereof the said commissioners on the part of the United States have hereunto set their hands and the undersigned members of the said Wichita and affiliated bands of Indians have set their hands, the day and year first above written.

O

Supreme Court of the United States.

No. 194.—October Term, 1906.

The United States Ex Relatione Willis C. West, Plaintiff in Error, *vs.* Ethan A. Hitchcock. | In Error to the Court of Appeals of the District of Columbia.

[March 4, 1907.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a petition for mandamus to require the Secretary of the Interior to approve the selection and taking of one hundred and sixty acres by the relator out of the lands ceded to the United States by the Wichita and affiliated bands of Indians, under an agreement of June 4, 1891, ratified by the Act of Congress of March 2, 1895, c. 188. (28 Stat. 876, 895–897.) The petition alleges that the relator is a white man married to a Wichita woman and thereby a member of the tribe, and that his adoption was confirmed and recognized in various ways set forth. By the second article of the agreement, as part of the consideration, the United States agreed that there should be allotted to each member of the said bands, native and adopted, one hundred and sixty acres out of the said lands, to be selected by the members, with qualifications not in question here. The fourth article contains provisions as to the title to allotments when they "shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior." After a demurrer to the petition, which was overruled, 19 App. D. C. 333, the Secretary answered, alleging that he had examined and considered the application of the relator and on July 3, 1901, had reached and announced a decision that the relator was not a member of the tribe, and thereupon had denied the application. The relator moved for a peremptory mandamus, which was denied, and filed a demurrer, which was overruled, and thereupon pleaded that the Secretary did not, by the decision alleged, decide that the relator was not a member of the tribe, and for that reason deny him the allotment. Issue was joined and evidence taken, and after a hearing judgment was entered for the respondent and the petition dismissed. The judgment was affirmed on appeal, 26 App. D. C. 290, and then the case was brought to this Court. The issues here are those raised by the plea, the demurrer to the answer and the motion for a peremptory writ.

It is argued that the answer admits the averments of the petition, as it does not deny them in terms, and that therefore it must be taken that there was no question concerning the relator's membership for the Secretary to decide. His identity was not disputed, nor, it is said, the acts of adoption that took place long before the relator applied to have his selection approved, and, therefore, the Secretary's duty was merely ministerial, to carry out the mandate of the Act. But the admission, at most, is only the admission implied by a plea of estoppel by judgment. In truth it hardly goes so far as that; for when a party says that he is the proper person to decide the question raised and that he has decided it against the party raising it, he hardly can be said to admit that his decision was wrong.

The approval of the Secretary required by the agreement must include as one of its elements the recognition of the applicant's right. If a mere outsider were to make a claim, it would have to be rejected by some one, and the Secretary is the natural if not the only person to do it. No list or authentic determination of the parties entitled is referred to by the agreement, so as to narrow the Secretary's duty to identification or questions of descent in case of subsequent death. The right is conferred upon the members of the bands, but the ascertainment of membership is left wholly at large. No criteria of adoption are stated. The Secretary must have authority to decide on membership in a doubtful case, and if he has it in any case he has it in all. Furthermore, as his decision is not a matter of any particular form, his answer saying that he has decided the case is enough; for even if he had not decided it before, such an answer would announce a decision sufficiently by itself.

But the answer was not confined to a general allegation that the Secretary had decided the case. It gave the date of the decision, and the relator, under his plea, put the decision in evidence. It was a letter which seemed to admit that the relator had been adopted by the Indians as a member of their tribe, but assumed that the adoption must have been approved by the Indian Office to be valid, as provided by a regulation of that Department. The relator contends that the validity of the adoption was a matter purely of Indian law or custom, and that the Department could not take it under control. Probably it would have been unfortunate for the Indians if such control had not been exercised, as the temptation to white men to go through an Indian marriage for the purpose of getting Indian rights is sufficiently plain. We are disposed to think that authority was conferred by the general words of the statutes. Rev. Sts. §§ 441, 463. By the latter section: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of the Indian relations." We

should hesitate a good deal, especially in view of the long-established practice of the Department, before saying that this language was not broad enough to warrant a regulation obviously made for the welfare of the rather helpless people concerned. The power of Congress is not doubted. The Indians have been treated as wards of the Nation. Some such supervision was necessary, and has been exercised. In the absence of special provisions naturally it would be exercised by the Indian Department.

However, it hardly is necessary to pass upon that point. Although the answer gave the decision a date, that did not open it for consideration. If the Secretary had authority to pass on the relator's right to select land, his jurisdiction did not depend upon his decision being right. By alleging that he had denied the application he did not invoke the revision of his reasons by a court, even when he saw fit to add the date. He raised no question of law, but simply stood on his authority and put forward his decision as final. As we have implied, such an answer affirms not merely the past but the present determination of the answering tribunal, and must be assumed to be based on reasons that the respondent deems adequate. Even if those given in the letter of July 3, 1901, had been bad, they could not be taken to exhaust the Secretary's grounds. He has not disclosed to the court any statement of those grounds purporting to be exhaustive and complete, and the Court cannot make an inquisition into his mental processes to see whether they were correct. See *DeCambra* v. *Rogers*, 189 U. S. 119, 122.

We doubt if Congress meant to open an appeal to the Courts in all cases where an applicant is dissatisfied. Of course the promise of the United States that there shall be allotted one hundred and sixty acres to each member of the Wichita band may be said to confer an absolute right upon every actual member of the band. But some one must decide who the members are. We already have expressed the opinion that the primary decision must come from the Secretary. There is no indication of an intent to let applicants go farther. There are insuperable difficulties in the way of at least this form of suit, and the Department of the Interior generally has been the custodian of Indian rights.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.